TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No. 716.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JULY 6, 1911.

(22,792.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1911.

1 THE UNITED STATES OF AMERICA:

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein The Atchison, Topeka and Santa Fe Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this Fifth day of June in the year of our Lord one thousand nine hundred and eleven.

JOHN C. POLLOCK,
United States District Judge for the District of Kansas.

Service accepted this 5th day of June 1911.

H. J. BONE,
U. S. Att'y.
McCABE MOORE,
Ass't U. S. Att'y.

2 [Endorsed:] No. 8760. United States Circuit Court, First Division of the Judicial District of Kansas. The A., T. & S. F. Ry. Co. vs. The United States. Citation. Filed 5th day of June 1911. Geo. F. Sharitt, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the January Term, 1911, thereof, between The Atchison, Topeka and Santa Fe Railway Company Plaintiff and The United States of America, defendant a manifest error hath happened, to the great damage of the said The Atchison, Topeka and Santa Fe Railway Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to

the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, and filed in the office of the Clerk of the Supreme Court of the United States, on or before the 5th day of July 1911, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 5th day of June in the year of our Lord one thousand nine hundred and eleven.

Issued at office in the City of Topeka, with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States, First Division of the Judicial District of Kansas.

Allowed by

JOHN C. POLLOCK, *Judge.*

4 [Endorsed:] No. 8760. United States Circuit Court First Division of the Judicial District of Kansas. The A., T. & S. F. Ry. Co. vs. The United States. Writ of error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 5" day of June 1911. Geo. F. Sharitt, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
First Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 29th day of June A. D. 1911.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk of said Court.

5 In the Circuit Court of the United States for the District of Kansas, First Division.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES, Defendant.

Petition.

To the Honorable Judges of the Circuit Court of the United States for the District of Kansas:

The Petition of The Atchison, Topeka and Santa Fe Railway Company respectfully represents:

I.

Your petitioner, a corporation duly created and existing under the laws of the State of Kansas, is a citizen of the District of Kansas, having its principal office and place of business at the City of Topeka, in the State of Kansas, and at all times hereinafter mentioned has owned and operated various lines of railway which have been, and are, divided by the Postmaster General of the United States into definite postal routes, designated by their respective termini and by numbers, and upon these routes your petitioner is transporting the mails of the United States under contracts with the Postmaster General, as will hereinafter more fully appear.

II.

The Act of Congress of March 3, 1873, contains the following provisions:

"The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole leng-h an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the

actual weighing of the mails for such a number of
6 sive working days, not less than thirty, at such time
June thirtieth, eighteen hundred and seventy-three,
less frequently than once in every four years, and the resu
stated and verified in such form and manner as the Postmast
eral may direct." (Sec. 4002 R. S.)

"Additional pay may be allowed for every line compr
daily trip each way of railway post office cars at a rate not ex
twenty-five dollars per mile per annum for cars forty feet in
and thirty dollars per mile per annum for forty-five foot ca
forty dollars per mile per annum for fifty-foot cars; and fifty
per mile per annum for fifty-five to sixty-foot cars." (Se
R. S.)

By the Act of July 12, 1876, Sec. 1, Ch. 179, (19 Stat. L.
compensation for the transportation of the mails on railroa
was reduced ten per cent from the rates fixed by Paragraph 2
4002 R. S., above quoted, to take effect from and after July

By the Act of June 17, 1878, Ch. 259 (20 Stat. L. 142), sa
pensation was further reduced five per cent from the rates the
fixed by the preceding acts.

The Act of March 3, 1879 (Sec. 4, 20 Stat. L. 358), pro

"That all cars or parts of cars used for the railway mail
shall be of such style, length and character, and furnished
manner, as shall be required by the Postmaster General, and
constructed, fitted up, maintained heated and lighted by an
expense of the railroad companies."

Sec. 1186 of the Postal Laws and Regulations provides as

"The rate of compensation for railroad service is compute
the average weight of mail per day carried the whole length
route; but it is essential that not only a certain weight of
carried, but also that it shall be carried with due frequen
speed, and that suitable apartments, equipped with necessary
and furniture, properly lighted and heated, provided with ic
and built in accordance with plans and specifications to be fu
by the General Superintendent of Railway Mail Service,
provided for railway postal clerks to accompany and distrib
mail, as accessories to the weight of mails."

The Act of March 2, 1907, Ch. 2513 (34 Stat. L. 1212),
the following provision:

"That after July first, nineteen hundred and seven, al
pay allowed for every line comprising a daily trip each way
way post office cars shall be at a rate not exceeding twenty-
lars per mile per annum for cars forty feet in length, and
seven dollars and fifty cents per mile for forty-five-foot c
thirty-two dollars and fifty cents per mile per annum for f
cars, and forty dollars per mile per annum for cars fifty-five
more in length."

7 III.

That during the fiscal year ending June 30, 1907, the Pos
General sent to your petitioner a copy of Form 2504*a* of t

Office Department, known as "Distance Circular," with the request that your petitioner fill in the blanks thereon with the data required pertaining to Postal Route 135,098, between Chicago, Illinois, and Kansas City, Missouri, and return said form to said department, as a basis for ascertaining, in accordance with the aforesaid Acts of March 3, 1873, July 12, 1876, June 17, 1878, and March 2, 1907, the compensation to be paid your petitioner for transporting the mails over said route 135,098 for the period of four years beginning July 1, 1907. Endorsed upon said form or Distance Circular was an agreement to be signed by your petitioner that it would transport the ascertained weights of mails for the period named and for the compensation thus to be allowed. With reference to the additional or special facilities in the way of railway post office cars to be used exclusively as traveling post offices for the carriage and distribution of the mails, the said agreement clause was signed with the express understanding that for the contract period to begin July 1, 1907, the existing three lines of sixty-foot railway post office cars then being operated over said route 135,098 would be paid for at $40 per mile per annum, as provided by the Act of Congress of March 2, 1907, hereinbefore referred to, said rate of compensation being a reduction of $16 per mile per annum from the rate established by previous acts. Said form, with said data filled in and with said agreement duly signed, was returned by your petitioner to the Post Office Department. Attached to and accompanying said form was a letter addressed to the Second Assistant Postmaster General dated July 1, 1907, and signed by the President of your petitioner, making protest against certain fines, orders, exactions, and requirements of the Post Office Department, and among other matters protest was therein made—

"Against furnishing space and facilities for distribution of mails on trains and for traveling post office purposes without specific space pay therefor";

"Against the expense caused by discontinuing lines of R. P. O. cars and requiring cars of another style to be provided, allowing no advance notice to prepare for such changes";

Said letter also contained the following:

8 "For the reason that your office intimates its denial of delay in adjustment of rates of pay and payment for service from July 1, 1907, unless signature is affixed to the Department Form 2504*a*, I have signed same noting exceptions to Orders Nos. 165 and 412, and to certain regulations outlined in this letter—and with the further understanding that this letter constitutes an exception to any future orders or regulations which in the opinion of this Company may be unjust or which may unfairly reduce the compensation for its services."

That on July 1, 1907, at the time of the signing and forwarding of said Form 2504*a* with said letter of protest attached thereto, there were in force and effect orders of the Post Office Department calling for the operation by your petitioner over said Route 135,098 of three lines of 60 foot railway post office cars, each making a daily round trip between Chicago, Illinois, and Kansas City, Missouri, on

trains Nos. 3, 7, and 9 westbound and trains Nos. 4, 8 and 10 eastbound, respectively. For this service your petitioner was entitled to receive under the acts cited, and did receive until the taking effect of the orders hereinafter set forth, additional pay for the transportation of the mails over said route amounting to $40 per mile per annum for each of said lines, said compensation being in effect from July 1, 1907, as provided by the Act of March 2, 1907, aforesaid:

Under date of July 18, 1907, the Acting Assistant Postmaster General made the following order:

"From July 23, 1907, authorize three half-lines R. P. O. cars 50-feet in length, inside measurement, to supersede three half-lines of such cars 60 feet in length, over Route 135,098, Chicago, Illinois, and Kansas City, Missouri."

Under date of November 20, 1907, your petitioner was advised as follows by the Second Assistant Postmaster General:

"No. 2508*a*.

POST OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL,
DIVISION OF RAILWAY ADJUSTMENT,
WASHINGTON, D. C., *Nov.* 20, 1907.

SIR: The compensation for the transportation of mails, etc., on Route No. 135,098, between Chicago, Ill., and Kansas City, Mo., has been fixed from July, 1907, to June 30, 1911 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing February 20, 1907, at the rate of $242,108.08 per annum, being $534.88 per mile for 452.64 miles, and pay is allowed for use of R. P. O. cars from July 1, 1907, to July 22, 1907, at the rate of $53,734.80 per annum, being $120.00 per mile for 442.94 miles, Chicago, Ill., to Congo Junction
9 (n. o.), for 3 lines 60 ft. cars and $60.00 per mile for 9.70 miles; Congo Junction (n. o.) to Kansas City for 3 half lines 60 ft. cars; and from July 23, 1907, to June 30, 1911, at the rate of $48,715.34 per annum, being $108.75 per mile for 442.94 miles, Chicago to Congo Junction (n. o.) for 3 half lines 60 ft. and 3 half lines 50 ft. cars, and $56.25 per mile for 9.70 miles, Congo Junction (n. o.) to Kansas City, for 2 half lines 60 ft. and 1 half line 50 ft. cars.

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

Very respectfully,

J. T. McCLEARY,
Second Assistant Postmaster General.

Mr. J. P. Lindsay, Gen. Agt., Atchison, Topeka and Santa Fe Railway Co., 1123 Railway Exchange, Chicago, Ill.

(Endorsement:) Subject to further readjustment in accordance with Section 1172 P. L. & R. where lap service is involved and not so readjusted."

Your petitioner says that the meaning, intent and effect of the aforesaid orders was to substitute 50 foot railway post office cars eastbound on the said three lines operated over Route 135,098 in place of the 60 foot cars theretofore required and operated on said route, thus requiring your petitioner to provide and operate 60-foot cars westbound and to provide and operate 50 foot cars eastbound upon said route and to accept a consequent reduction in pay for railway post office cars from the rate allowed by the act of Congress aforesaid, under which said contract was made.

Your petitioner says that it does not own any 50 foot railway post office cars, and that in order to comply literally with said order, it would be required to purchase such cars at great expense, to be operated eastbound only, and deadheaded or hauled empty westbound, and at the same time to keep and maintain in use and service on said route the 60 foot cars now in operation thereon, and to operate them westbound only and deadhead or haul them empty eastbound, thus keeping in use and service on said route twice the number of cars required under former orders of the Post Office Department for a less compensation. That in order to avoid the great expense of purchasing 50 foot cars, and the further expense of deadheading or hauling empty such cars westbound and deadheading or hauling empty said 60 foot cars eastbound as aforesaid, for which it would receive no compensation, your petitioner has been compelled, in order to minimize its loss as far as possible, to operate the said 60 foot cars in each direction on said postal route, but nevertheless, your petitioner is allowed and receives pay from the Post Office Department
10 only for operating 60 foot cars westbound and 50 foot cars eastbound.

That order 1219 of the Postmaster General of date March 28, 1908, amending Section 1169 of the Postal Laws and Regulations of 1902, in relation to railway post office cars, contains the following provisions:

"3. A line consists of a car or cars sufficient to perform a daily round trip over the whole route, and full pay therefor will be allowed only where such car or cars are accompanied by an employee or employees of the postal service in the discharge of the duties of distributing and handling the mails, as contemplated by the use of such cars in the service, except as hereinafter provided. The authorization of railway post office cars may be made as follows:

a. In determining the amount of space which shall be the basis for a recommendation and authorization of railway post office cars and pay therefor, the principal element shall be the amount of space necessary for railway post office purposes, that is, for the handling and the distribution of the mails en route, the storage of the mails to be so distributed, and the storage and handling of registered matter and mails for local delivery.

b. Where the needs of the postal service in both directions warrant the authorization of cars of uniform size in both directions the au-

thorization may be made for a line of cars of such size at the maximum rate of pay provided by law.

c. Where the needs of the postal service require 40 feet of car space for railway post office purposes in one direction, but less than 40 feet in the opposite direction, a line of 40 foot cars may be authorized. If more than 40 feet are required in one direction and less than 40 feet in the opposite direction a line of cars of the dimensions required to perform the maximum service may be authorized by agreement with the railroad company with pay equal to half the sum of the pay for a line of cars of the maximum length and a line of cars 40 feet in length.

d. If the needs of the service require at least 40 feet in one direction and greater space in the opposite direction a line of cars of the dimensions required to perform the maximum service may be authorized by agreement with the railroad company with pay equal to half the sum of the pay for a line of cars of the maximum length and a line of cars of the maximum length required."

Your petitioner says that it has never agreed or consented to the establishment of said so-called half-lines of railway post office cars upon said Route 135,098, nor upon any other route operated by your petitioner, and the consequent reduction of pay on account thereof, but, on the contrary, has at all times protested to the Post Office Department against the establishment thereof and the reduced allowance of pay herefor, and has contended, and still contends, that, your petitioner having under the requirements of the aforesaid Acts of Congress, the Postal Laws and Regulations and the Orders of the Post Office Department, provided railway post office cars at
11 a cost of $7,262.62 per car to fulfill the requirements and specifications of the Post Office Department, which, after inspection by the designated Inspector of that Department, were accepted for service and are used exclusively for the distribution and transportation of the mails, and which may not be used in whole or in part for any other purpose, it is unreasonable and unjust, and a breach of contract for the Post Office Department to make orders from time to time during the quadrennial contract period changing the rates of pay for such service as allowed by Congress and attempting to compel your petitioner to accept reduced pay for the use of 60 foot cars which have been purchased by direction of the Post Office Department at large expense to your petitioner.

That by virtue of the aforesaid orders of the Post Office Department, the pay allowed your petitioner for the operation of the post office cars upon said route has been reduced from $40 per mile per annum, as fixed by Congress, to $36.25 per mile per annum, a reduction of $3.75 per mile per annum for each line. That the total length of said three lines is 1348.22 miles, making a total reduction or loss in pay to your petitioner of $5,005.82 for the full fiscal year of 365 days ending June 30, 1908, or the sum of $4,750.55 for the 343 days of said fiscal year on which said cars were actually operated. And your petitioner avers that the amount so unlawfully deducted and withheld from it during the year ending June 30, 1908, is the sum of $4,750.55.

Wherefore, the premises considered, your petitioner prays judgment against the United States for the sum of $4,750.55, with its costs in this behalf incurred.

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,
By GEO. T. NICHOLSON, *Its Third Vice-President.*

W. R. SMITH,
A. A. SCOTT,
Att'ys for Pl'ff.
ROBERT DUNLAP,
Of Counsel.

12 COUNTY OF COOK,
State of Illinois, ss:

Before me, John A. McDonald, a Notary Public in and for said county and state, personally appeared Geo. T. Nicholson, who, being duly sworn by me, under oath says that he is the Third Vice-President of petitioner in the foregoing petition; that he has read said petition and knows the contents thereof; that the allegations hereof are true to the best of his knowledge, information and belief; that there is justly due from the United States to the petitioner about the sum claimed therein after allowing of just credits and set-offs, and that no assignment of said claim or interest therein has been made.

Subscribed and sworn to before me this 13th day of January, 1909.

[SEAL.] JOHN A. McDONALD,
Notary Public.

My commission expires Oct. 4, 1909.

Endorsed: No. 8760. In the Circuit Court of the United States for the District of Kansas, First Division. The Atchison, Topeka and Santa Fe Railway Company vs. The United States. Petition. Filed Jan'y 21, 1909. Geo. F. Sharitt, clerk.

13 In the Circuit Court of the United States for the District of Kansas, First Division.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA, Defendant.

Affidavit.

STATE OF KANSAS,
County of Shawnee, ss:

Alfred A. Scott, of lawful age, being first duly sworn, deposes and states that he is one of the attorneys for the plaintiff in the above-entitled case.

That on the twenty-first day of January, 1909, he served a copy of the plaintiff's petition in said case upon the Honorable H. J. Bone, the District Attorney of the United States for the District of Kansas, at the City of Topeka, Kansas, and did also on the same day mail a copy of said petition by registered letter to the Attorney General of the United States at Washington, D. C.

ALFRED A. SCOTT.

Subscribed and sworn to before me this 21st day of January, 1909.

[SEAL.] GEO. N. HOLMES,
Notary Public.

My Commission expires Jan'y 18, 1911.

Endorsed: No. 8760. In the Circuit Court of the United States for the District of Kansas, First Division. The Atchison, Topeka and Santa Fe Railway Company, vs. The United States. Affidavit of Service. Filed Jan'y 21, 1909. Geo. F. Sharitt, clerk.

14 In the Circuit Court of the United States, District of Kansas, First Division.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA, Defendant.

Answer.

Now comes the defendant the United States, by Harry J. Bone, its attorney for the District of Kansas and J. S. West, Assistant United States Attorney for said district, and for answer to plaintiff's petition herein admits the corporate character and citizenship of the plaintiff as alleged, and admits that it has been transporting mail under contract with the Postmaster General over Route 135,098, between Chicago, Illinois and Kansas City, Missouri.

II.

Further answering, this defendant shows to the court and alleges by authority of Section 396 of the Revised Statutes the Postmaster General is authorized and required "to control according to law and subject to the settlement of the Sixth Auditor, all expenses incident to the service of the department." "To superintend the disposal of the moneys of the department." "To superintend generally the business of the department and execute all laws relative to the public service."

That by virtue of Section 161 of the Revised Statutes the Postmaster General is authorized to prescribe regulations not inconsistent with law for the government of his department, the conduct of its officers and clerks, distribution and performance of its business, and the custody, use and preservation of the records, papers and prop-

erty appertaining to it. That in pursuance of the authority thus vested in him, the Postmaster General has for many years entered into contracts with railway companies for the carriage of mail, in railway mail cars, and has from time to time promulgated and published rules and regulations for the government of the Post Office Department of the United States, all of which is and at all times hereinafter mentioned, was well known to the plaintiff.

15 III.

The defendant admits that during the fiscal year, ending June 30, 1907, the Postmaster General sent to plaintiff a copy of form 2504*a* known as "Distance Circular", with the request that plaintiff fill in the blanks thereon with the data required pertaining to Postal Route 135,098, and return the same to said department as a basis for ascertaining the compensation to be paid plaintiff for transporting mails over said route for the period of four years, beginning July 1, 1907, and that there was endorsed upon said circular an agreement to be signed by plaintiff that it would transport the ascertained weight of mails for the period named, for the compensation thus to be allowed. (But defendant denies that with reference to the additional or special facilities in the way of railway post office cars to be used exclusively as traveling post offices for the carriage and distribution of the mails, said agreement clause was signed with the express understanding that for the contract period, to begin July 1, 1907, the existing three lines of sixty foot railway post office cars then being operated over said route, would be paid for at forty dollars per mile per annum. Defendant admits that accompanying said Distance Circular was a letter, by the President of plaintiff, addressed to the Second Assistant postmaster General, protesting against certain fines, orders, exactions and requirements of the Post Office Department but alleges that notwithstanding said protests the plaintiff continued to transport the mails as required by the Postmaster General in pursuance of the contract evidenced by said Distance Circular, and pursuant to and in accordance with the rules and regulations issued and to be issued by the Postmaster General.

Defendant alleges the fact to be that printed upon said Distance Circular, above the place for signature by the president of plaintiff, was and is the following:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the requirements of the department, applicable to railroad mail service."

To which language there was added in typewriting the following:

"Except Order 165, issued by the Postmaster General March 2nd, 1907. Order No. 412, issued by the Postmaster General June 7, 1907 (see letter of protest dated July 1, 1907)."

16 After which the signature of E. P. Ripley, President of the plaintiff.

That in connection with said Distance Circular, said E. P. Ripley, President of plaintiff, addressed to the Second Assistant Postmaster General, dated Chicago, July 1, 1907, a letter containing various protests, including the following:

"F. Against furnishing space and facilities for distribution of mails on trains and for traveling post office purposes without specific space pay therefor."

"K. Against the expense caused by discontinuing lines of R. P. O. cars, and requiring cars of another style to be provided, allowing no advance notice to prepare for such changes."

And after certain other protests, said letter closed as follows:

"For the reason that your office intimates its denial of delay in adjustment of rates of pay and payment for services from July 1, 1907, unless signature is affixed to the department Form 2504*a*, I have signed same noting exceptions to Orders Nos. 165 and 412 and to certain regulations outlined in this letter, and with the further understanding that this letter constitutes an exception to any future orders or regulations which, in the opinion of this Company, may be unjust or which may unfairly reduce the compensation for its services."

That in response to said Distance Circular and letter protest, the Second Assistant Postmaster General addressed the following letter to J. P. Lindsay, General Mail Agent of plaintiff, under date of October 3, 1907:

"SIR: This office is in receipt of the Distance Circular for Route 135,098 from Chicago, Ill., to Kansas City, Mo., filed by you for the term beginning July 1, 1907, and ending June 30, 1907, for railroad mail service by your Company.

Note is taken of the modification made by you in the agreement clause in which you except Order No. 165 issued by the Postmaster General March 2, 1907, and Order No. 412 issued by the Postmaster General June 7, 1907, and enter protest against other rules, regulations or requirements of the department with respect to the performance of services. In regard to this, I have to advise you that the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your Company will be subject, as in the past, to all the postal laws and regulations which are now or may became applicable during the term to this service."

That said letter by the Second Assistant Postmaster General, was duly authorized, and the said official had full legal authority to so write and state in behalf of the defendant and the Postmaster General of the United States, and said J. P. Lindsay, the addressee
17 of said letter, was then the duly authorized agent and spokesman of plaintiff with full power to speak and act for it in all matters touching compensation for the carriage of mails over said route.

IV.

Defendant further shows to the court and alleges, that there is no statute in existence which prescribed other than a maximum rate to be allowed and paid by the Postmaster General for the carriage of mails over routes like the one in controversy, and that the Post-

master General, acting by himself or by his assistants, has and had full power and authority to contract with the plaintiff for the carriage of mails over said route, and to procure the carriage thereof for compensation less than the maximum rate named in any statute touching said subject. That pursuant to the correspondence hereinbefore quoted, the plaintiff through its various officers, agents and attorneys continued to complain to and criticise the Postmaster General and his assistants and department for not acceding to the views and wishes of the plaintiff in respect to the compensation it desired to receive for the transportation of mails over said route, but that in answer to all of said complaints and criticisms the defendant was, at all times, fully and plainly advised that its said views and wishes could not and would not be acceded to, but that its compensation would be such as indicated in the printed portion, hereinbefore quoted, of the said Distance Circular.

V.

Defendant further shows to the court and alleges that with full knowledge of all the matters hereinbefore set forth, the plaintiff nevertheless continued to transport the mails over said route, and continued to perform the service which it had agreed to perform, and thereby acceded to and agreed to accept the rate of compensation fixed and provided by the Postmaster General, and is thereby precluded from lawfully asking or recovering a greater compensation therefor.

VI.

Defendant further shows to the court and alleges that a conference between representatives of the principal railroads of the United States and the officials of the Post Office Department was held in the City of Washington in the early part of the year 1908, the
18 plaintiff being represented at said conference. That as result of such conference paragraph three of Section 1179 of the Postal Laws and Regulations was amended, certain portions of said amendment being as follows:

"D. If the needs of the service require at least forty feet in one direction, and greater space in the opposite direction, a line of cars of the dimensions required to perform the maximum service may be authorized by agreement with the railroad company, with pay equal to half the sum of the pay for a line of cars of the maximum length, and a line of cars of the minimum length required.

E. Where railway post office cars are operated in one direction over one route, and in the opposite direction over another route, they may be authorized as half lines over the routes over which they run at half the rate of a line of cars of the dimensions needed for the purposes of the postal service, over the routes respectively with a minimum allowance of a forty foot basis.

F. Where a line of sixty-foot cars is authorized and paid for, and the needs of the service require additional space, but do not warrant the authorization of an additional line of forty-foot cars, it is proper to require the railroad company to furnish apartment space.

G. Pay for the maximum length of cars authorized may be allowed, when under all the facts and circumstances the same is deemed justified."

After this amendment the said J. P. Lindsay, then the duly authorized agent, representative and spokesman of and for the plaintiff, visited Washington and conferred with the then Second Assistant Postmaster General, Hon. J. T. McCleary, and the Superintendent of Railway Adjustment, Mr. Joseph Stewart, concerning the authorization for railway post office car space between Chicago and Kansas City, and then and there acting by and on behalf of the plaintiff, and with full authority so to do, agreed with said officials to state the service between Chicago and Kansas City, in accordance with the terms of said paragraph three, as amended by the Postmaster General; that in accordance with this agreement orders were issued April 28, 1908, to state the service as three lines of sixty-foot cars with pay equal to half the sum of the pay for the three lines of sixty-foot cars, and three lines of fifty-foot cars, of which orders the plaintiff was promptly and duly notified and advised, but failed and has ever since failed and refused to comply with or keep the agreement so entered into by its authorized agent J. P. Lindsay.

19 VII.

Defendant further shows to the court and alleges that in view of the service over said route, and the manner of handling the mail cars between Kansas City and Chicago, going and coming, the rates so agreed upon, and so fixed and provided by the Postmaster General, were and are lawful, reasonable and just. That except as hereinbefore admitted, the defendant denies each and every allegation in plaintiff's petition contained.

H. J. BONE,
United States Attorney.
J. S. WEST,
Assistant United States Attorney.

Endorsed: No. 8760. In the Circuit Court of the United States, District of Kansas, First Division. The Atchison, Topeka & Santa Fe Railway Company vs. The United States of America. Answer. Filed M'ch 18, 1909. Geo. F. Sharitt, clerk. H. J. Bone, J. S. West.

20 In the Circuit Court of the United States for the District of Kansas, First Division.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES, Defendant.

Reply.

Comes now the said plaintiff and for its reply to the answer of the defendant, filed in the above entitled cause, denies each and every

allegation of new matter set out in said answer which is inconsistent with the averments contained in plaintiff's petition.

Wherefore, plaintiff prays judgment as prayed for in its petition.

W. R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plaintiff.

Endorsed: #8760. In the Circuit Court of the United States, District of Kansas. The A., T. & S. F. Ry. Co. vs. The United States. Reply. Filed June 7, 1909. Geo. F. Sharitt, clerk.

21 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Journal Entry.

And now on this first day of June, 1910, the above entitled cause came on for trial before the Court on the issues joined between the parties plaintiff and defendant. The plaintiff appeared by William R. Smith and A. A. Scott, its attorneys and the defendant appeared by H. J. Bone, United States District attorney, and J. S. West, Assistant United States District attorney.

Thereon, after the testimony had been introduced and the case submitted on behalf of both parties, the plaintiff was allowed by the court until July 1, 1910 to prepare and serve on counsel for defendant its brief and findings of fact, and the said defendant was allowed until August 1, 1910, to prepare and serve on counsel for plaintiff a brief and findings of fact on behalf of the United States; said briefs and findings of fact to be at once thereafter submitted to the court.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8760. A. T. & S. F. Ry. Co. vs. United States Journal Entry Received and Filed July 1, 1910. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
UNITED STATES OF AMERICA, Defendant.

Now on this first day of March A. D. 1911, the above cause coming for decision and having been submitted by said plaintiff and said fendant on the 1st day of July A. D. 1910 to the court, for hearing on the pleading of said plaintiff and said defendant and the evi- nce submitted by each of said parties, and the court having heard arguments of counsel for the respective parties and being fully vised in the premises after consideration of all the evidence ds:—

1. That said plaintiff, so far as the facts in this case are concerned, not a land grant aided railway within the meaning of the law ap- cable to this action.

2. That said plaintiff was under no obligation to said defendant the absence of express contract to that effect to continue the trans- rtation of the mails or the furnishing of space in its cars to be d as Railway Post Offices on the route in question being mail route . 135098, from Kansas City in the state of Missouri, to Chicago the State of Illinois, after July 23, 1907, the date when the order the Postmaster General complained of by said plaintiff, took ect, and that said portion of plaintiff's line of railway, from nsas City, Missouri, to Chicago, Illinois, was constructed long er its Kansas line and was not aided by said defendant through nts of public lands, or otherwise in so far as the controversy in s action is concerned.

3. That as shown by the evidence no such express con- tract existed between said plaintiff and said defendant on July 23, 1907, and the minds of the said respective parties empting to contract did not meet and the propositions made by e to the other of said parties were not accepted.

4. That there is no evidence of the reasonable value of the serv- s performed by said plaintiff.

It is therefore ordered considered and adjudged, that said defend- t have and recover judgment herein.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8760. Circuit Court of the United States, District Kansas, First Division. The Atchison, Topeka & Santa Fe Rail- y Co. vs. The United States of America. J. E. Filed M'ch 1, 11. Geo. F. Sharitt, clerk.

24 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Notice.

To Honorable H. J. Bone, United States District Attorney:

You will please take notice that the plaintiff in the above entitled action will, on Wednesday, May 17, 1911, at ten o'clock a. m. of said day, or as soon thereafter as counsel can be heard, request the Honorable John C. Pollock, at his chambers in Kansas City, Kansas, to make certain additional findings of fact in said case, copy of which request for findings is hereto attached.

Dated this 12th day of May, 1911.

WM. R. SMITH,
A. A. SCOTT,
Attorney- for Plaintiff.

Service of the foregoing notice is hereby acknowledged this 12" day of May, 1911.

H. J. BONE,
U. S. Att'y.

25 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Request for Additional Findings of Fact.

Comes now the plaintiff in the above entitled cause and requests the court to make findings of fact in said case separate and apart from the opinion of the court filed therein, and to make the following findings of fact in addition to those heretofore made by the court to-wit:

That on July 1, 1907 at the time of the signing and forwarding of said Form 2504*a* with said letter of protest attached thereto, there were in force and effect orders of the Post-Office Department calling for the operation by the Railway Company, over said Route

135098, of three lines of sixty-foot railway post-office cars, each ing a daily round trip between Chicago, Illinois, and Kansa
Missouri, on trains Nos. 3, 7 and 9, westbound, and
26 Nos. 4, 8 and 10, eastbound respectively.

That for said service the Railway Company was e to receive and was receiving, up to July 1, 1907, under the March 3, 1873, pay at the rate of $50.00 per mile per annu each of said lines and was entitled to receive, after July 1, under the Act of March 2 1907, pay at the rate of $40.00 p per annum, and did receive such pay until the taking effect orders hereinafter referred to. Such compensation was in a to the pay allowed for the transporting of the mails on the l weight.

That on July 1, 1907, at the time of the execution of sa tract for the transporting of the mails upon said route, it w uniform practice and custom of the Post-Office Department t and to pay to the railway companies the maximum rates fi Congress for the operation of railway post-office cars, and to c such rates from one contract period to another, unless a low was expressly agreed to between the Department and the R Company (A. 73, 77-79).

(1) Refused and exception allowed.

That the meaning, intent and practical effect of said ord to require the Railway Company to operate the three lines o foot cars on said route and to receive pay therefor upon th of sixty-foot cars in one direction and fifty-foot cars in the o direction, or in other words, at a rate of pay equal to half the the pay for sixty-foot cars and fifty foot cars.

(2) Refused and exception allowed.

That under the rules and regulations of the Departmen way post-office cars must be used exclusively for post-office pu and if a portion of a car is used for other than such p
27 the Railway Company will not be entitled to railwa office car pay therefor (Sec. 1179, P. L. & R. 1902).

(3) Refused and exception allowed.

That upon being notified by the Department of its order 18, 1907, aforesaid Mr. J. P. Lindsay, the General Mail A the Railway Company, in charge of all matters pertaining railway mail service on said railroad, immediately telegrap Second Assistant Postmaster General as follows:

"Company has no half-lines of sixty feet cars on Route to be superseded and finds no law or competent regulation f notice or order; therefore objects to change in authorization duction of pay" (A. 26).

(4) Refused and exception allowed.

That the Railway Company has, ever since the promulg said orders, upon every proper occasion, both orally and in objected to and protested against the establishment of said h on said route, and the consequent reduction of pay therefor, consistently maintained said attitude of objection and prote to the present time. The Railway Company has not, by

action of any of its duly authorized officers or agents, agreed to or acquiesced in the establishment of half-lines upon said route and the consequent reduction of pay, nor in any manner waived its right to demand the full compensation allowed by act of Congress for the operation of sixty-foot post-office cars thereon.

(5) Refused and exception allowed.

That the Railway Company continued to operate said sixty-foot cars in both directions on said routes during the fiscal year ending June 30, 1908, at the reduced pay, but always under protest, as aforesaid, the entire space in said cars being utilized by the Post-Office Department exclusively for post-office purposes, and the Railway Company not being permitted to use any portion thereof.

(6) Refused and exception allowed.

That on April 21, 1908, a conference was held between a commission appointed by the Postmaster-General and representatives of the railroad companies protesting against half-car-line service, at which the commission heard the representations of the railroad companies, considered the matter, and reported thereon. The
28 commission's recommendations were adopted by the Postmaster-General and promulgated in Order 1219 of March 28, 1908, amending Section 1179 of the Postal Laws and Regulations of 192. In speaking of this report the Second Assistant Postmaster-General, in his report to the Postmaster-General for the year ending June 30, 1908, said:

(7) Refused and exception allowed.

"The report contemplates the restatement, with increased pay, in those cases where the conditions of the service will warrant it or where half-lines have been authorized without agreement and under objections, and where agreements cannot be secured for their continuance."

Order 1219 provides:

"*d.* If the needs of the service require at least forty feet in one direction and greater space in the opposite direction a line of cars of the dimensions required to perform the maximum service may be authorized by agreement with the railroad company with pay equal to half the sum of the pay for a line of cars of the maximum length and a line of cars of the minimum length required."

(8) Refused and exception allowed.

No such agreement has ever been obtained by the Department from the plaintiff Railway Company in this case.

The Railway Company has always consistently objected to and protested against half-car-lines and the principle involved therein, whenever sought to be introduced by the Department upon any postal route operated over any of its lines of railroad.

(9) Refused and exception allowed.

That it would have been wholly impracticable to comply literally with said order of July 18, 1907, and to actually operate cars of the two dimensions specified on said route and the Department when it made the order, did not intend nor expect a literal compliance therewith, but intended that the Railway Company should

and expected that it would continue to operate the sixty-foot
in both directions at the reduced pay.

(10) Refused and exception allowed.

29 By virtue of the orders complained of, the pay allowed
Railway Company for the operation of post-office cars u
said route has been reduced from $40.00 per mile per annum as fi
by Congress, to $36.25 per mile per annum, a reduction of $3.75
mile per annum for each line. That the total length of said th
lines is 1348.22 miles, making a total reduction or loss in pay to
Company of $5005.82 for the full fiscal year of 365 days end
June 30, 1908, or the sum of $4750.55 for the 343 days of said fi
year on which said cars were actually operated.

The plaintiff also objects and excepts to the last paragraph
finding No. VIII, made by the court as follows:—

During all the time the plaintiff has continued to perform
service of transporting the mails and furnishing postoffice railway
space and it has received compensation for such space in compli
with the order of the Postmaster General of July 18, 1907, at the
fixed by law and plaintiff has at all times protested against the
thority of the Postmaster General to make said order or reduce
compensation for such service.

For the reason that the same is not in accordance with the
dence in the case and asks that the same be stricken out and not
cluded in the court's findings.

WM. R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plainti

Endorsed: #8760. In U. S. Circuit Court. The A., T. & S
Ry. Co. vs. The United States. Request for additional finding
facts. Filed May 12, 1911. Geo. F. Sharitt, clerk.

Requests to find as to facts preferred by plaintiff and refused
the court except as contained in findings made by the court to
refusal of the court to make the within findings and each of th
plaintiff excepts.

JOHN C. POLLOCK, *Judg*

30 In the Circuit Court of the United States for the Distric
Kansas, First Division.

No. 8760. Law.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPAN
Plaintiff,
vs.
THE UNITED STATES, Defendant.

Motion.

Comes now the above named plaintiff and moves the court to
porarily set aside the judgment rendered in the above entitled c

on the 1st day of March, 1911, and to make a finding of the facts in the case, established by the evidence, in the nature of a special verdict, and a separate statement of the conclusions of law upon said facts upon which the court founds its judgment or decree, in accordance with the practice prescribed by Rule 2 of the Supreme Court relating to appeals from the Court of Claims, and thereupon to render judgment accordingly in order that the record in the case may be in proper condition to prosecute an appeal or writ of error to the Supreme Court of the United States, which the said plaintiff intends to do.

W. R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plaintiff.

Endorsed: #8760. In U. S. Circuit Court, District of Kansas, First Division. The A., T. & S. F. Ry. Co. vs. The United States. Motion. Filed May 23, 1911. Geo. F. Sharitt, clerk.

31 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Kansas City, Kansas, in said District, on Monday the 9th day of January A. D. 1911, proceedings were had and appear of record in words and figures as follows to-wit:—

Present: Hon. John C. Pollock, Judge.

SATURDAY, *May 27th*, 1911.

8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES, Defendant.

Order.

Now on this 27th day of May, 1911, this case came on for hearing before the court upon the motion of the plaintiff filed herein to temporarily set aside the judgment rendered herein on the 1st day of March, 1911, and to make a finding of facts in the case established by the evidence, in the nature of a special verdict, and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree, in accordance with the practice prescribed by Rule 2 of the Supreme Court of the United States relating to appeals from the Court of Claims, in order that the record in the case may be in proper condition to prosecute an appeal or writ of error to the Supreme Court, and thereupon to render judgment accordingly, and after argument of counsel and being fully advised

in the premises the court doth find that under the rules of the Supreme Court relating to appeals from the Court of Claims, a finding of facts in the case, established by the evidence, in the nature of a special verdict, and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree, must be made and filed before or at the time the judgment is entered and that this rule was not followed in rendering judgment in this case and that therefore said motion should be sustained and the judgment and findings of fact heretofore rendered should be temporarily set aside until such time as the court can make and file its separate finding of facts and conclusions of law in accordance with said rules, in order to permit the plaintiff to perfect proceedings in error in said case.

32 It is therefore considered, ordered and adjudged by the court that the judgment and findings of fact heretofore rendered in this case on the 1st day of March, 1911, be and the same is hereby set aside and vacated.

33 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760. Law.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Memoranda of Decision on Merits of the Case.

This is an action at law brought by plaintiff, The Atchison, Topeka & Santa Fe Railway Company, to recover the sum of $4750.55, a balance alleged by plaintiff to be due and owing it from the government on a contract made between the parties for space in railway postoffice cars used by defendant in the handling of the mails over plaintiff's line of road between the city of Chicago, Ill., and the city of Kansas City, Mo., from July 23, 1907 to July 1, 1908. The facts necessary to decision rest almost entirely in documentary evidence and are conceded by the parties in all matters of substance to be practically undisputed. They are as stated in the findings of fact.

From the facts as found and stated it is apparent the order of the Postmaster General of July 18, 1907, as set forth therein, gave rise to the controversy presented and the authority and effect of that order alone need be considered.

In this regard it is the contention of plaintiff said order and its enforcement was beyond the power of the Postmaster General for two reasons: (1) Because it was issued in violation of the terms and conditions of an express contract between plaintiff and defendant providing for the transportation of the mails over route 135098 and providing compensation to plaintiff for space occupied by the government in railway postoffice work, which contract it is contended

was under existing laws obligatory on plaintiff to perform because the construction of its road was aided by land grants made by
34 the government, hence the enforcement of said order against plaintiff would be a breach of public faith; (2) because it is contended it is beyond the power of the Postmaster General under existing laws to authorize and establish what is called half line space railway postoffice cars or to reduce the compensation for the performance of such service below the maximum provided by law for the service performed.

On the contrary, the defendant denies there was any contract in existence between the parties under the terms of which plaintiff was compelled to transport the mails over the route in question or to provide space in its cars to be used by the government for railway postoffice purposes, and contends in view of the state of the contractual relations between the parties, and the law, the Postmaster General had full power and authority to issue and enforce the half line order made July 18, 1907, as made.

Some further contention is made by the government that plaintiff has waived its right to insist on the demand here presented or is estopped by the acts and conduct of its authorized agents from so doing, which in the view taken of the case, need not be considered or further mentioned.

The underlying and fundamental principles of plaintiff's argument are there; that it was aided in the construction of its road by lands granted by the government, and as a condition of the grant of such lands plaintiff is obligated to transport the mails for the government over the route in question and may not decline to perform such service. That providing space in railway postoffice cars for the use of the government is a necessary adjunct to the transportation of the mails. Therefore, as plaintiff was not free to decline the performance of the service, the enforcement of the order complained of against plaintiff constitutes an unwarranted breach of public faith on the part of the government in that it reduced the compensation theretofore allowed for the performance of the service and imposes unnecessary and burdensome conditions on plaintiff in its performance. And the case of Chicago & Northwestern Railway Co. v. U. S. 104 U. S. 680 is cited as conclusive authority for the position taken.

Is this position tenable?

35 Notwithstanding section 401 Revised Statutes provides:

"All railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation."

And the further provision of section 13 of Act of Congress of July 12, 1876, 19 Stat., L. 82, which provides:

"SECTION 13. That railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mail should be transported over their road at such

price as Congress should by law direct, shall receive only eighty per cent of the compensation authorized by this act."

Yet, in so far as the facts of this case are concerned, I am of the opinion: (1) The plaintiff is not a land grant aided railway within the meaning of the above quoted acts; (2) that it was under no obligation to the government in the absence of an express contract to that effect to continue the transportation of the mails or the furnishing of space in its cars to be used as railway postoffices on the route in question after July 23, 1907, the date the order complained of took effect; and (3) as shown by the evidence, no such contract existed between the parties at that date. All for the following reasons. While it is true the plaintiff was aided by grants of land in the construction of its line of railway through the state of Kansas from the city of Atchison to the Colorado line, yet the postal route in question extends from Kansas City in the state of Missouri to Chicago in the state of Illinois. This portion of plaintiff's line of railway was constructed long after its Kansas line and its construction was not aided by the government through grants of public lands, or otherwise. Hence, notwithstanding the broad and comprehensive language employed in section 13 of the act of July 12, 1876, above quoted, it is conclusively settled by the construction placed thereon by the Supreme Court in United States v. Ala. R. R. Co. 142 U. S. 615, affirming the decision of the Court of Claims in the same case, (25 Ct. of Cl. 30) as that portion of the line of plaintiff's road over which the postal route in question extends was not aided by
36 land grant, in so far as the controversy here presented is concerned, the plaintiff is not to be deemed a land grant aided railway. It is further conclusively settled, not being a land grant aided railway, it was under no obligation to the government to carry the mails or furnish the adjuncts relating thereto, such as space in its cars for railway postoffice, or to contract with the government to perform such services, but was free to carry the mails or to decline to carry them or to contract with the government for the performance of such services or to decline to contract, as the judgment of its management might dictate. Eastern R. R. Co. v. U. S. 129 U. S. 391; Minneapolis & St. L. Ry. Co. v. U. S., 24 Ct. of Cl., 350.

Again, it would appear too evident for argument no express contract for the carrying of the mails, or to furnish space to be used by the government for railway postoffice work en route resulted from the correspondence and propositions exchanged between the parties as set forth in the facts above found and stated. For, as the evidence clearly shows the minds of the parties attempting to contract did not meet and the propositions made one to the other were not accepted as made, hence were rejected. Mr. Justice Gray, delivering opinion of the court in Minneapolis &c., R'y v. Columbus R'g Mill, 119 U. S., 149, said:

"A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiations, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an accept-

ance of it. Eliason v. Henshaw, 4 Wheat. 225; Carr v. Duval, 14 Pet. 77; National Bank v. Hall, 101, U. S. 43, 50; Hyde v. Wrench, 3 Beavan, 334; Fox v. Turner, L. Bradwell, 153."

It follows, from what has been said, in so far as this controversy is concerned the plaintiff is not to be deemed a land grant aided railway, hence, it was under no obligation to the government to continue the performance of the service of transporting the mails over route number 135098 and the furnishing of space in its cars to be used by the government for railway postoffice work en route after
37 July 23, 1908, in the absence of express contract between the parties. And further, as plaintiff refused to contract with the government on the terms proposed by it through the Postmaster General in the distance circular, its continued performance of such service entitled it to demand and receive only such compensation for the service performed as is reasonable and just.

The only question remaining for decision is, was the act of the Postmaster General in issuing the order of authorization of July 18, 1907, which established three half lines of fifty foot cars and three half lines of sixty foot cars, instead of the then existing three full lines of sixty foot cars, unauthorized and beyond his power, considered in relation to the rights of the plaintiff in this case?

Section 4004 Revised Statutes, as amended by act of March 2, 1907, provides, as follows:

"Additional pay may be allowed for every line comprising a daily trip each way of railway postoffice cars at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five foot cars; and forty dollars per mile per annum for fifty foot cars; and fifty dollars per mile per annum for fifty five or sixty foot cars. (R. S. Sec. 4004.)

"That after July 1, 1907, additional pay allowed for every line comprising a daily trip each way of railway postoffice cars shall be at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length, and $27.50 per mile for forty five foot cars, and $32.50 per mile per annum for fifty foot cars, and forty dollars per mile per annum for cars fifty-five feet or more in length. (Act of March 2, 1907, 34 Stat. L. 1212.)

The act of March 1879, Section 4, 20 Stat. L., 358, provides:

"That all cars or parts of cars used for the railway mail service shall be of such style, length and character, and furnished in such manner, as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated and lighted by and at the expense of the companies."

The postal regulations also define railway postoffice car
38 lines and the space therein which can be compensated for as follows:

"A line consists of a car or cars sufficient to perform a daily round trip over the whole route, and full pay therefor will only be allowed where such car or cars are accompanied by an employé or employés of the postal service in the discharge of the duties of distributing and handling the mails as contemplated by the use of such cars in the service. (Sec. 1169 paragraph 3, P. L. & R.)

In view of the above statutory provisions conferring large powers on the Postmaster General, it is apparent the maximum rate of compensation therein fixed for the service performed is merely one that cannot be exceeded in any contract made by the postoffice department of the government with a railway company, and not that such maximum rate may in the absence of contract to that effect be demanded by a railway company for the performance of the service. And to this effect are the adjudicated cases. Eastern R. R. Co., 20 Ct. of Cl. 23; Minn. & St. R. Ry. Co. v. U. S. 24 Ct. of Cl., 350; Texas Pacific Railway Co. v. U. S. 28 Ct. of Cl. 379. Therefore, the compensation to be paid for the performance of the service authorized, not being fixed by the law, but being left to the judgment of the Postmaster General to contract for the performance of the service within certain prescribed bounds, and as the plaintiff in this case refused to contract with the government on the terms proposed by the Postmaster General, as has been seen, it is quite too clear for argument, had the order complained of establishing the half line service not been made, and the plaintiff had continued the performance of the service, as it was done, after July first, 1907, when its contract expired, it could not, as a matter of right, demand the maximum rate prescribed by the statute, but would be relegated to its action to recover the reasonable value of the service performed. As this action is brought by the plaintiff to recover additional compensation for the performance of the service based on an express contract, when no such contract is found to exist, and as there is no evidence found in the record of the reasonable value of the service performed by the plaintiff, it is manifest the plaintiff cannot recover any amount in addition to
that heretofore received by it for the service performed, al-
39 though the amount heretofore paid was received by it under protest.

It follows, the right of the Postmaster General to authorize the half car lines he did in this case, and adjust the compensation to be paid therefor as against the rights of the plaintiff performing the service in the absence of any contract therefor with the government fixing the rate of compensation to be paid, must be sustained and the additional compensation demanded by the plaintiff of the government be denied.

Judgment will enter for the defendant.

It is so ordered.

JOHN C. POLLOCK, *Judge*.

Kansas City, Kansas, May 27th, 1911.

Endorsed: No. 8760. A. T. & S. F. Ry. Co. vs. The United States. Memoranda of Decision on merits of case. Filed May 27, 1911. Geo. F. Sharitt, Clerk.

40 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,

v.

THE UNITED STATES, Defendants.

This case having been heard by the Circuit Court of the United States for the District of Kansas, the court, upon the evidence, makes the following

Findings of Fact.

I.

For a period of four years next prior to June 30, 1907, in pursuance of a contract between the plaintiff, the Atchison, Topeka & Santa Fe Railway Company, and the United States, made in accordance with the provisions of the Postal Laws and Regulations of the Post Office Department of the Government, plaintiff had transported the United States mails between the city of Chicago, Illinois, and the city of Kansas City, Missouri, over its line of railroad, the same being mail route No. 135098. Compensation for the service of transporting the mails under this contract had been fixed in the manner provided by law, and did not vary during the four years' term. In addition to the compensation allowed plaintiff for transporting the mails an additional compensation was allowed for furnishing and operating railway post-office cars over said route, which was stated in order of September 23, 1903, and which was many times during said period of four years *and* changed on account of additional authorizations of lines, discontinuance of lines, and additional authorizations of lines of cars of greater length in lieu of cars theretofore authorized, and in each instance the maximum rate of pay prescribed by act of Congress for the space authorized was allowed and paid.

A line of railway post-office cars consists of sufficient cars of the dimensions named to make a round trip over the entire route in twenty-four hours in the service of carrying mails for distribution enroute.

41 III.

It is the duty of the Postmaster General to readjust the compensation paid for transporting the mails over railway postal routes and make new contracts with railway corporations for the performance of such service at least once in every four years.

IV.

The compensation to be paid for such service is determined by two factors, the distance the mails are carried by the company and

the average daily weight carried over the entire line. In arriving at a basis for computing the compensation to be paid a railway company for the service of transporting the mails, the average daily weight of mail carried by the railway is ascertained by the Government by an actual weighing of the mails, and what is known as a distance circular is prepared and signed by the railway company stating the exact length of the line, the distance between stations thereon, etc.

V.

In addition to the compensation paid for the actual transportation of the mails where the same are carried in cars forty feet in length or more, compensation is allowed for the space occupied in such cars as fixed by law, and as such space is designated to be used by the Postmaster General by his orders.

VI.

The new contract term for service on the route mentioned began July 1, 1907. The service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and regulations, subject, with reference to the rate of compensation to be fixed and paid for transportation under the provisions of Revised Statutes, Section 4002 and amending acts, to the order of the Postmaster General to be thereafter made readjusting such pay, as provided by said acts, based upon the average daily weight of mails carried as ascertained by a weighing of the mails upon said route, as provided by law; and subject with respect to the rate of pay to be allowed for railway post-office car service, to the order of the Post-Master General stating the specific allowance to be made in accordance with the provisions of Revised Statutes, Section 4004,
42 as amended by the act of March 2, 1907.

VII.

As the four year contract between plaintiff and defendant for the transportation of the mails over the route in question which began July 1, 1903, would terminate June 30, 1907, the Postmaster General in compliance with his duty to readjust the compensation to be thereafter paid, and to make a new contract in reference thereto, notified the plaintiff of the date when the mails would be weighed for the purpose of fixing a basis of such compensation, and on February 19, 1907, the Second Assistant Postmaster General sent to the plaintiff copy of Form 2504-A of the Post Office Department, known as a Distance Circular with the request that it fill in the blanks thereon with the data required pertaining to postal route No. 135098. Printed on said form was the following clause of agreement: "The Company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service." To this printed agreement there was added in typewriting by the plaintiff, "Except Order 165 issued by the Postmaster General March 2, 1907. Order No. 412, issued by the Postmaster General June 7,

1907," after which the same was signed by the plaintiff under the hand of its president and transmitted to the Postoffice Department. The completed circular was returned on July 22, 1907, and reached the Post Office Department July 24, 1907. Accompanying the transmission of this circular the president of plaintiff addressed to the Postmaster General a letter under date of July 1, 1907, containing various protests and the reason for executing the agreement, as follows:

"*f*. Against furnishing space and facilities for distribution of mails on trains and for traveling postoffice purposes without specific space pay therefor."

"K. Against the expense caused by discontinuing lines R. P. O. cars and requiring cars of another style to be provided, allowing no advance notice to prepare for such changes."

And as a reason for executing the same, the following:

"For the reason that your office intimates its denial of
43 delay in adjustment of rates for pay and payment for services from July 1, 1907, unless signature is affixed to the Department Form 2504-A, I have signed same noting exceptions to Orders Nos. 165 and 412, and to certain regulations outlined in this letter—and with the further understanding that this letter constitutes an exception to any future orders or regulations which in the opinion of this company may be unjust or which may unfairly reduce the compensation for its services."

VIII.

Under date of October 3, 1907, the Second Assistant Postmaster General replied to the foregoing letter, as follows:

This office is in receipt of the distance circular for Route 135098 from Chicago, Ill., to Kansas City, Mo., filed by you for the term beginning July 1, 1907, and ending June 30, 1911, for railroad mail service by your company. Note is taken of the modification made by you in the agreement clause in which you except Order No. 165 issued by the Postmaster General March 2, 1907, and Order No. 412, issued by the Postmaster General June 7, 1907, and enter your protest against other rules regulations or requirements of the Department with respect to the performance of services. In regard to this, I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which which are now or may become applicable during the term of this service.

IX.

On July 18, 1907, the plaintiff was operating over such route railway post-office cars 60 feet in length sufficient to constitute three full lines, such lines having been duly authorized theretofore. On

that date the Postmaster General made the following order with reference thereto:

44 From July 23, 1907, authorize three half lines R. P. O. cars fifty feet in length, inside measurement, to supersede three half lines of such cars sixty feet in length over route 135098, Chicago, Ill., and Kansas City, Mo.

This left the authorized space in such cars westbound at 60 feet to the car and in cars east-bound at 50 feet to the car. The company was duly notified of such restatement of authorized space and upon receipt of the notice objected to the change in authorization and reduction of pay. The Department replied under date of July 25, 1907, that the order was made in accordance with reports showing that no greater space than that authorized was needed for postal requirements in the cars in question. By letter of July 29, 1907, the plaintiff further questioned the reason for reduction in pay below the maximum rates fixed by law. By letter of August 3, 1907, the Department replied, stating that the order in question was made strictly in accordance with the practice with reference to the authorization of railway postoffice car space. By letter of August 3, 1907, the plaintiff protested against the effect of the order in question. The Department by letter of August 19, 1907, replied, reaffirming its position and stating that there was nothing to add "excepting to make it clear that the Department cannot under any circumstances pay for more space than authorized by the regular orders."

During all this time, and subsequent to the receipt of the notification from the Department last above referred to, the plaintiff continued to operate the cars and to carry the mails and clerks therein.

X.

On November 20, 1907, in accordance with the weight of the mails as ascertained and the distances as stated in the distance circular, the Department notified plaintiff of the compensation fixed for transporting the mails and the space required in railway post-office cars under order of July 18 until same should be readjusted, as follows:

45 No. 2508–A.

POST OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL,
DIVISION OF RAILWAY ADJUSTMENT,
WASHINGTON, D. C., *Nov.* 20, 1907.

SIR: The compensation for the transportation of mails, etc. on Route No. 135,098, between Chicago, Ill., and Kansas City, Mo., has been fixed from July 1, 1907 to June 30, 1911 (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing February 20, 1907, at the rate of $242,108.08 per annum, being $534.88 per mile for 452.64 miles, and pay is allowed for use of R. P. O. cars from July

1, 1907, to July 22, 1907, at the rate of $53,734.80 per annum, being $120 per mile for 442.94 miles, Chicago, Ill., to Congo Junction (n. o.) for 3 lines 60 ft. cars and $60.00 per mile for 9.70 miles; Congo Junction (n. o.) to Kansas City for 3 half lines 60 ft. cars; and from July 23, 1907 to June 30, 1911, at the rate of $48,715.34 per annum, being $108.75 per mile for 442.94 miles, Chicago to Congo Junction (n. o.) for 3 half lines 60 ft. and 3 half lines 50 ft. cars and $56.25 per mile for 9.70 miles, Congo Junction (n. o.) to Kansas City for 2 half lines 60 ft. and 1 half line 50 ft. cars.

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

Very respectfully, J. T. McCLEARY,
Second Assistant Postmaster General.

Mr. J. P. Lindsay, Gen. Agt. Atchison, Topeka and Santa Fe Railway Co., 1123 Railway Exchange, Chicago, Ill.

(Endorsement:) Subject to further readjustment in ac-
46 cordance with Section 1172 P. L. & R. where lap service is involved and not so readjusted.

The plaintiff by letter of December 2, 1907 acknowledged receipt of this order and protested against the half lines of railway post-office cars and rates of pay therefor as stated therein. To this the Second Assistant Postmaster General by letter bearing date December 14, 1907, replied, calling attention to previous letter upon the subject and advising the plaintiff that the Department cannot pay more for the performance of service than the rates of compensation named in the orders adjusting the pay, and in accordance with the orders authorizing railway post-office car space. By letter of January 11, 1908, the plaintiff stated that it reserved the right to claim pay for additional facilities required, to which the Second Assistant Postmaster General, by letter of January 16, 1908, replied:

The rate of compensation for railway post-office cars is fixed upon the authorization of space, such authorization being in accordance with the practice of the Department, and the needs of the postal service.

Also, that—

The Department will not pay any additional compensation for any other weights of mails or facilities claimed to be furnished by the company except as duly ascertained and authorized by this office. The continuance of performance of service upon this route must be with this understanding.

To this letter the plaintiff replied March 27, 1908, stating:

Your letter of January 16, 1908 is noted but will not be accepted as a legal denial of any consistent rights or claim the company may properly and reasonably present.

By letter of November 27, 1907, the Washington attorneys for the plaintiff acknowledged receipt of the Post-Office Depart-
47 ment warrant in settlement for railway postoffice car service on the route in question for the September, 1907, quarter,

and stated that it was accepted under protest, to which the Second Assistant Postmaster General replied by letter of November 30, 1907, stating that—

Notwithstanding the protest, any service performed by the company must be with the distinct understanding that the amount named in the readjusting order is all that can be paid for the service.

During all the time the plaintiff has continued to perform the service of transporting the mails and furnishing railway postoffice car space and it has received compensation for such space in compliance with the order of the Postmaster General of July 18, 1907 and plaintiff has at all times protested against the authority of the Postmaster General to make said order or reduce the compensation for such service.

XI.

The plaintiff in the construction of its line of railway from the city of Kansas City in the state of Missouri to the City of Chicago, in the State of Illinois, was not aided by any grant of land or other property made thereto by the defendant.

XII.

The difference between the rate of compensation allowed by the Postmaster General's orders complained of, heretofore received by plaintiff under protest, and the rate of compensation which could have been allowed at the maximum rate provided by law from July 23, 1907, the date when such orders took effect, to July 1, 1908, had the order constituting the half line of 50 foot cars not been made is $3.75 per mile per annum over route for each line of cars, or a total of $4,769.79.

JOHN C. POLLOCK,
Judge of said Court.

Done this 27th day of May, 1911 at Kansas City, Kansas.

48 Endorsed: No. 8760. In the Circuit Court of the United States for the District of Kansas, First Division. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff vs. The United States Defendants. Findings of Fact. Filed May 27, 1911. Geo. F. Sharitt, clerk.

49 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
v.
THE UNITED STATES, Defendants.

This case having been heard by the Circuit Court of the United States for the District of Kansas, the court, upon the facts above found and stated, concludes the law to be as follows.

Conclusions of Law.

1. The line of railway of the Atchison, Topeka and Santa Fe Railway Company between the city of Kansas City in the State of Missouri, and the city of Chicago in the State of Illinois, was not constructed in whole or in part by any grant of land or other property made by Congress on the condition that the mail should be transported over the same at such price as Congress should by law direct.
2. The plaintiff is not entitled to recover in this action, and judgment must go for the defendant.

JOHN C. POLLOCK,
Judge of said Court.

Endorsed: No. 8760. In the Circuit Court of the United States for the District of Kansas, First Division. The Atchison, Topeka & Santa Fe Railway Company, plaintiff vs. The United States, Defendants. Conclusions of Law. Filed May 27, 1911. Geo. F. Sharitt, clerk.

50 UNITED STATES OF AMERICA,
District of Kansas, ss:

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Kansas City, Kansas, in said District on Monday, the 9th day of January A. D. 1911, proceedings were had and appear of record in words and figures as follows to-wit:—

Present: Hon. John C. Pollock, Judge.

8760.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

SATURDAY, *May* 27, 1911.

And now on this 27th day of May, 1911, the court having made and filed a finding of facts in the case, established by the evidence,

in the nature of a special verdict, and a separate statement of th conclusions of law upon said facts, upon which the court founds i judgment, in accordance with the practice prescribed by Rule 2 the Supreme Court relating to appeals from the Court of Claim upon said finding of facts and conclusions of law, it is considere ordered and adjudged by the court that the plaintiff take nothin by this suit and that the defendant do have and recover of and fro the plaintiff its costs in this behalf expended; whereof let executio issue.

51 In the Circuit Court of the United States for the District Kansas, First Division.

No. 8760. At Law.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff,
vs.
THE UNITED STATES, Defendant.

Petition for Writ of Error.

And now comes The Atchison, Topeka and Santa Fe Railwa Company the above-named plaintiff and says that on or about th 27th day of May, 1911, the said Circuit Court entered a judgmer herein in favor of the defendant and against this plaintiff, in whic judgment and the proceedings had prior thereto in this cause, ce tain errors were committed to the prejudice of this plaintiff, all which will more in detail appear from the assignment of erro which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issu in this behalf out of the Supreme Court of the United States for th correction of errors so complained of, and that a transcript of th record, proceedings and papers in this cause, duly authenticate may be sent to the Supreme Court of the United States.

W. R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plaintiff.

Endorsed: #8760. In the Circuit Court of the United State District of Kansas. The A., T. & S. F. Ry. Co. vs. The Unite States. Petition for Writ of Error. Filed June 5, 1911. Geo. Sharitt, clerk.

52 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760. At Law.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

First: The court erred in refusing to make the following findings of fact and each of them, which were duly requested in writing by plaintiff:

1. That on July 1, 1907, at the time of the execution of said contract for the transporting of the mails upon said route, it was the uniform practice and custom of the Post-Office Department to allow and pay to the railway companies the maximum rates fixed by Congress for the operation of railway post-office cars, and to continue such rates from one contract period to another, unless a lower rate was expressly agreed to between the Department and the Railway Company (A. 73, 77-79).

2. That the meaning, intent and practical effect of said orders was to require the Railway Company to operate the three lines of sixty-foot cars on said route and to receive pay therefor upon the basis of sixty-foot cars in one direction and fifty-foot cars in the opposite direction, or in other words, at a rate of pay equal to half the sum of the pay for sixty-foot cars and fifty-foot cars.

3. That under the rules and regulations of the Department, railway post-office cars must be used exclusively for post-office purposes, and if a portion of a car is used for other than such purpose,
53 the Railway Company will not be entitled to railway post-office car pay therefor (Sec. 1179, P. L. & R. 1902).

4. That upon being notified by the Department of its order of July 18, 1907, aforesaid Mr. J. P. Lindsay, the General Mail Agent of the Railway Company, in charge of all matters pertaining to the railway mail service on said railroad, immediately telegraphed the Second Assistant Postmaster General as follows:

"Company has no half-lines of sixty feet cars on Route 135098 to be superseded and finds no law or competent regulation for your notice or order; therefore objects to change in authorization and reduction of pay" (A. 26).

5. That the Railway Company has, ever since the promulgation of said orders, upon every proper occasion, both orally and in writing, objected to and protested against the establishment of said half-lines on said route, and the consequent reduction of pay therefor, and has consistently maintained said attitude of objection and protest down

to the present time. The Railway Company has not, by word or action of any of its duly authorized officers or agents, agreed to or acquiesced in the establishment of half-lines upon said route and the consequent reduction of pay, nor in any manner waived its right to demand the full compensation allowed by act of Congress for the operation of sixty-foot post-office cars thereon.

6. That the Railway Company continued to operate said sixty-foot cars in both directions on said routes during the fiscal year ending June 30, 1908, at the reduced pay, but always under protest, as aforesaid, the entire space in said cars being utilized by the Post-Office Department exclusively for post-office purposes, and the Railway Company not being permitted to use any portion thereof.

7. That on April 21, 1908, a conference was held between a commission appointed by the Postmaster-General and representatives of the railroad companies protesting against half-car-line service, at which the commission heard the representations of the railroad companies, considered the matter, and reported thereon. The
54 commission's recommendations were adopted by the Postmaster-General and promulgated in Order 1219 of March 28, 1908, amending Section 1179 of the Postal Laws and Regulations of 1902. In speaking of this report the Second Assistant Postmaster-General, in his report to the Postmaster-General for the year ending June 30, 1908, said:

"The report contemplates the restatement, with increased pay, in those cases where the conditions of the service will warrant it or where half-lines have been authorized without agreement and under objections, and where agreements cannot be secured for their continuance."

8. Order 1219 provides:

"*d*. If the needs of the service require at least forty feet in one direction and greater space in the opposite direction a line of cars of the dimensions required to perform the maximum service may be authorized by agreement with the railroad company with pay equal to half the sum of the pay for a line of cars of the maximum length and a line of cars of the minimum length required."

No such agreement has ever been obtained by the Department from the plaintiff Railway Company in this case.

9. The Railway Company has always consistently objected to and protested against half-car-lines and the principle involved therein, when ever sought to be introduced by the Department upon any postal route operated over any of its lines of railroad.

10. That it would have been wholly impracticable to comply literally with said order of July 18, 1907, and to actually operate cars of the two dimensions specified on said route and the Department when it made the order, did not intend nor expect a literal compliance therewith, but intended that the Railway Company should and expected that it would continue to operate the sixty-foot cars in both directions at the reduced pay.

55 Second. The court erred in its conclusion of law that the plaintiff is not entitled to recover in this action and that judgment must go for the defendant.

Third: The court erred in rendering judgment in favor of the defendant and against the plaintiff.

Wherefore, the plaintiff prays that said judgment be reversed.

W. R. SMITH,
ALFRED A. SCOTT,
Attorneys for Plaintiff.

Endorsed: #8760. In the Circuit Court of the United States, District of Kansas. The A. T. & S. F. Ry. Co. vs. The United States. Assignment of Errors. Filed June 5, 1911. Geo. F. Sharitt, clerk.

56 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8760. At Law.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Plaintiff,
vs.
THE UNITED STATES, Defendant.

Order Allowing Writ of Error.

Now on this 5th day of June, 1911, comes the above named plaintiff, by its attorneys, and files herein and presents to the court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond, according to law, in the sum of five hundred dollars, which shall operate as a supersedeas bond.

JOHN C. POLLOCK, *Judge.*

Endorsed: #8760. In the Circuit Court of the United States, District of Kansas. The A. T. & S. F. Ry. Co. vs. The United States. Order allowing Writ of Error. Filed June 5, 1911. Geo. F. Sharitt, clerk.

57 Know All Men by These Presents, That we, The Atchison, Topeka and Santa Fe Railway Company are held and firmly bound unto The United States of America in the full and just sum of Five Hundred dollars to be paid to the said The United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this Third day of June in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at the January term, A. D. 1911, of the Circuit Court of the United States for the First Division of the Judicial

District of Kansas, in a suit depending in said Court between The Atchison, Topeka and Santa Fe Railway Company *is* plaintiff, and The United States of America *is* defendant, judgment was rendered against the said The Atchison, Topeka and Santa Fe Railway Company and the said the Atchison, Topeka and Santa Fe Railway Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the Condition of the Above Obligation is Such, That if the said The Atchison, Topeka and Santa Fe Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of .

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, [SEAL.]

By WM. R. SMITH, *Its Attorney.* [SEAL.]

A. O. WELLMAN.

E. L. COPELAND. [SEAL.]

Approved by
JOHN C. POLLOCK, *Judge.*

58 [Endorsed:] No. 8760. United States Circuit Court, First Division of the Judicial District of Kansas. The A., T. & S. F. Ry. Co. vs. The United States. Bond. $500.00/100. Filed June 5, 1911. Geo. F. Sharitt, Clerk.

59 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States, of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in Case No. 8760 wherein The Atchison, Topeka and Santa Fe Railway Company is Plaintiff and The United States is defendant.

I further certify that the Original Citation and Writ of Error are hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 29th day of June A. D. 1911.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: File No. 22,792. Kansas C. C. U. S. Term No. 716. The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, vs. The United States. Filed July 6th, 1911. File No. 22,792.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 716

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This suit was originally instituted by the Railway Company against the United States, in the Circuit Court of the United States for the District of Kansas, under the Tucker Act, to recover a balance claimed to be due for the use of railway post office cars for the fiscal year ending June 30, 1908, operated over route designated as 135098 between Chi-

cago and Kansas City. The amount claimed as unlawfully deducted and withheld from the pay of the Railway Company was stated as $4,750.55.

As required by the Tucker Act the Circuit Court made certain findings of fact and conclusions of law. (Trans., 27-33.)

From these findings of fact as well as from the admissions in the pleadings and the opinion of the lower court (Trans., 22-26) the following may be regarded as the salient facts:

Prior to July 1, 1907, under a quadrennial contract with the Post Office Department, which would expire on June 30th of that year, the Railway Company was engaged in transporting the mails on the above route, and also furnished for the use of the postal authorities on such route three 60-foot railway post office cars each operated in separate trains from Chicago to Kansas City and return and each car making the round trip within a 24-hour period. These cars were specially constructed and equipped at great expense to comply with the postal laws and regulations. Pay for carrying the mails was adjusted in accordance with Section 4002 of the Revised Statutes. For the use of each of these postal cars for the round trip it received the maximum allowed by Section 4004 of the Revised Statutes; namely, $50.00 per mile per annum, being the additional pay allowed under said section "for every line comprising a daily trip each way of railway post office cars."

Section 1179 of the Postal Regulations provided:

> "1. No payment for railway post office cars can be allowed unless full cars of the length au-

thorized (inside measurement), fully equipped in accordance with the requirements of the General Superintendent of Railway Mail Service, are furnished and *used exclusively for post office purposes.*

2. *The assignment of space in cars used partially for other than railway post office purposes will not entitle the railroad company to railway post office car pay.*

3. *A line consists of a car or cars sufficient to perform a daily round trip over the whole route,* and full pay therefor will only be allowed where such car or cars are accompanied by an employe or employes of the postal service in the discharge of the duties of distributing and handling the mails, as contemplated by the use of such cars in the service."

On March 2, 1907, Section 4004 of the Revised Statutes allowing additional pay for every line of railway postoffice cars was amended (34 Stat. L. 1212, Ch. 2513) to read as follows:

"After July 1, 1907, additional pay allowed for *every line comprising a daily trip each way of railway post office cars* shall be at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length, and twenty-seven dollars and fifty cents per mile per annum for forty-five foot cars, and thirty-two dollars and fifty cents per mile per annum for fifty foot cars, and forty dollars per mile per annum for cars fifty-five feet or more in length."

This would reduce the maximum pay for a sixty foot railway post office car ten dollars per mile per annum.

As the four year contract between plaintiff and defendant for the transportation of mails over the route in question would terminate June 30, 1907, the Postmaster General, in compliance with his duty to

readjust the compensation to be thereafter paid and to make a new contract in reference thereto, notified plaintiff of the date when the mails would be weighed for the purpose of fixing a basis for such compensation, and on February 19, 1907, the Second Assistant Postmaster General sent to plaintiff a copy of Form 2504-A of the Post Office Department, known as a "Distance Circular," with the request that it fill in the blanks thereon with the data required pertaining to Postal Route 135098. Printed on said Form was the following clause:

> "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

To this printed agreement there was added in typewriting by plaintiff Railway Company:

> "Except Order 165, issued by the Postmaster General, March 2, 1907. Order 412, issued by the Postmaster General, June 7, 1907."

This was signed and transmitted to the Post Office Department. Accompanying the transmission of this circular the President of the plaintiff addressed to the Postmaster General a letter dated July 1, 1907, containing various protests and the reason for executing the agreement as follows:

> "f. Against furnishing space and facilities for distribution of mails on trains and for traveling post office purposes without specific pay therefor."
>
> "k. Against the expense caused by discontinuing lines R. P. O. cars and requiring cars of another style to be provided, allowing no advance notice to prepare for such changes."
>
> "For the reason that your office intimates its

denial of delay in adjustment of rates for pay and payment for services from July 1, 1907, unless signature is affixed to the Department form 2504-A, *I have signed same noting exceptions* to Orders 165 and 412 and to certain regulations outlined in this letter,—*and with the further understanding that this letter constitutes an exception to any future orders or regulations* which in the opinion of this Company may be unjust *or which may unfairly reduce the compensation for its services.*"

On July 18th, 1907, plaintiff was operating over such route railway post office cars 60 feet in length sufficient to constitute three full lines, such lines having been duly authorized theretofore. On that date the Postmaster General made the following order:

> "From July 23, 1907, authorize three half lines R. P. O. cars fifty feet in length, inside measurement, to supersede three half-lines of such cars sixty feet in length over route 135098, Chicago, Ill., and Kansas City, Mo."

Such order, it is evident, if complied with would require the Railway Company to furnish and operate 60-foot railway post office cars in one direction and 50-foot railway post office cars in the opposite or return direction, thus involving an empty haul without pay of each of such cars in at least one direction, or it would require the Railway Company to furnish a 60-foot car for both directions and receive the pay therefor in one direction but while also furnishing it in the other direction only receive pay for a 50-foot car.

The Railway Company promptly objected to this

order or requirement as unjust, arbitrary and unreasonable and at all times declined to be bound by it. It continued to furnish for the fiscal year 60-foot cars and the same were in fact accepted and used by the Postal authorities in both directions.

Not until October 3, 1907, during all of which time the Government had used the 60-foot cars, did the Second Assistant Postmaster General take exceptions to the modifications made by the Railway Company upon Circular 2504-A, when such Second Assistant stated:

> "It must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your Company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term to this service."

That view, however, was never acceded to by the Railway Company and it particularly objected to the above order which attempted to create half car lines,—something not contemplated or provided by the statute which provided pay at a rate per annum for car lines and defined the same, to be a car or cars on a round trip.

In November, 1907, the Second Assistant Postmaster General notified the plaintiff of the adjustment of compensation for carrying the mails and allowed the maximum of $40.00 per mile for the use of sixty-foot cars up till July 22, 1907, but arbitrarily cut the pay for the use of such cars after that date by allowing only for three half lines of sixty-foot cars each at the maximum rate of $40.00 per

mile per annum, provided in the statute for 60-foot cars, and three half lines of 50-foot cars each at the maximum rate of $32.50 per mile per annum provided in the statute for 50-foot cars.

The Railway Company promptly protested against this deduction and accepted its warrant or voucher only under written protest to the Department. In other words, the warrant was accepted under protest with the distinct understanding that the Railway Company did not waive its rights.

Thus it will be seen that the Railway Company furnished for the use of the Government 60-foot railway post office cars; that the Government in fact accepted and used such post office cars in both directions and, while willing to pay for the use of such cars one way the maximum rate,—namely, $40.00 per mile per annum, attempted to evade full payment for the use of such cars the other way upon the ground that its order only authorized a *fifty-foot space* in such cars in such other direction at the maximum provided by statute. In other words, instead of paying for the car length of the car in fact used it attempted to arbitrarily adjust the pay upon the basis of space which it proposed to use in such car one way. Yet under the regulations of the Postal Department no part of the space of such car could be used by the Railway Company for any other purpose. The difference between the rate of compensation allowed by the Postmaster General's orders complained of and heretofore received by the plaintiff under protest and the rate of compensation which was authorized be made as the

maximum rate under the Act of Congress from July 23, 1907, the date when the order objected to and complained of was made effective, to July 1, 1908, had said half car line order not been made, is $3.75 per mile per annum over the route for each line of cars or a total of $4,769.79.

The court concluded as matter of law:

First. There was no express contract fixing the compensation to be paid for the use of these cars; next, there was no evidence in the record of the reasonable value of the service performed by plaintiff, stating:

> "It is manifest that plaintiff cannot recover any amount in addition to that heretofore received by it for the service performed although the amount heretofore paid was received by it under protest."

Thereupon judgment was entered for the defendant.

Specifications of Error.

1. The court erred in holding that plaintiff was not entitled to recover and that judgment must go for defendant.

2. The court erred in holding that there was no evidence or basis in the record of the reasonable value of the service performed by plaintiff. On the contrary all the admissions in the record go to show that the maximum allowed by Congress, $40.00 per mile, was a reasonable charge for the use of a 60-foot car, which was in fact furnished by the Railway Company and accepted and used by the Government.

ARGUMENT.

I.

THE PARTIES WERE AGREED UPON THE VALUE OF SIXTY-FOOT POSTAL CAR LINES AS THE MAXIMUM RATE PRESCRIBED BY CONGRESS, AND AS SUCH CAR LINES WERE IN FACT USED BY THE GOVERNMENT IT MUST BE HELD AS HAVING AGREED TO PAY THAT VALUE.

The trial court concluded, as a matter of law, that there was no express contract fixing the price or amount to be paid for the use of these cars. This was upon the assumption that the letter of the Railway Company and the exceptions noted upon the distance circular (Form 2504-A) of the Department varied from the terms supposed to be proposed in that circular of the Government, and that, therefore, the exception or statement of the Railway Company that it would not be bound by future orders or regulations which it deemed unjust, or which unfairly reduced its compensation, was not acceded to by the Government and, that, therefore, there was no agreement between the parties governing the rate of compensation to be paid the Railway Company for the use of its cars.

The court relied for this position upon the case of *Minneapolis, etc., Railway* v. *Columbus R. G. Mill Company*, 119 U. S., 149, which is in no sense analogous. In that case it was simply held that, where one makes an offer to sell or contract upon certain terms and the other party accepts the offer with

modifications, the first party is at liberty to withdraw because there has been no binding agreement entered into.

Here, however, we have an entirely different case. We have the Government's circular upon which was endorsed, to be signed by the Railway Company, an agreement to transport the mails on the conditions prescribed by law and the regulations of the Department, which, to say the least, in all fairness could only refer to regulations in force at the time. The Railway Company did not choose to be bound by certain orders and regulations which it regarded as unjust, nor did it choose to be bound by future regulations or orders which would materially affect its pay or the character of the service it was required to perform. In other respects it was willing to carry the mails and furnish postal railway cars for the use of the Department. It proceeded or continued to carry the mails and to furnish 60-foot cars for use in both directions upon the route in question.

The Government in fact accepted and used such cars during the entire period in question.

There was no controversy between the parties as to the amount of pay which was proper for the use of a 60-foot car.

When the Railway Company objected to the order of the Department creating for the first time what it was pleased to designate as "Half Car Lines," showing it did not agree thereto, and refused to be bound or accede to such unjust requirement, it was for the Government then to determine whether it would use the cars of the Railway Company which

were tendered to it for use or whether it would decline the same because its terms were not acceptable. It certainly could not use the cars of the Railway Company and dictate its own price. It was for the owner of the property to fix the price for its use.

It may be true that the parties have not agreed in all respects upon all the terms, but where they have proceeded to act under negotiations, and one party has had all the benefit of the negotiations, it is for the court to determine from the facts admitted or found in what respects the parties have agreed or been of one mind, and in what respects the law will imply an agreement for them in the absence of an express understanding.

A contract frequently contains a number of agreements of the respective parties; that is,—stipulations or provisions about which their minds are at one, or upon which they are agreed. Here they were agreed as to the value of a sixty-foot car line; that such a line was worth the maximum prescribed by Congress of $40.00 per mile per annum. They did not agree upon the use of half car lines and such half car lines were not in fact adopted. As a full car line was in fact used, and not the half lines, and as the Government in fact accepted sixty-foot cars for its use in both directions, the agreed value of such line or use was understood by the parties as being worth or at the rate of $40.00 per mile per annum.

The Railway Company very plainly offered to the Government the use of 60-foot railway post office cars. The use was for both directions going and re-

turning upon the same route. The fair compensation for the use of such a car was admitted by the Government to be the maximum of $40.00 per mile per annum per car line. The Government sought to force the Railway Company to furnish to it a 60-foot postal car in one direction and a 50-foot postal car on the return. The Railway Company, declining to divide the car line defined in the Act of Congress upon which it was entitled to base its pay, objected to furnishing a car of one dimension one way and a car of a lesser dimension for the return trip, because the maximum pay allowed per car line if thus divided would not be reasonable or adequate. It did in fact furnish a 60-foot car for the round trip or line and such a car was in fact accepted by the Postal Department and used by it. So that as a practical matter the postal authorities waived or abandoned the order in regard to half car lines. As stated, there was no misunderstanding between the parties as to the proper pay to be made for a 60-foot car line.

After the parties were proceeding under the arrangement as modified by the Railway Company the Second Assistant Postmaster General arbitrarily attempted to reduce the compensation, not upon the ground that $40.00 per mile per annum was not the proper charge for a 60-foot car, but solely upon the ground that he only wished to use on the return trip of such car fifty feet of space therein, well knowing that under existing regulations the Railway Company was not permitted to use any vacant space in such car for its own purposes.

The remarks of the Government Comptroller in a recent case submitted to him (a copy of whose opinion we attach as an Appendix) are somewhat pertinent here. In that case, as in this, the Railway Company refused to be bound by an order of the Postal Department which required the furnishing rent free of a room at a given station for the transfer of the mails, having excepted to the same in its acceptance of the Distance Circular, and it was fined therefor. In the concluding portion of his opinion the Comptroller says:

> "It is sufficient for the purpose of this case to say that the railroad company has never agreed during the period from June 30, 1910, to July 1, 1914, to furnish a room, rent free, at this station. On the contrary, it protested against such an arrangement and undertook to do its own transferring as part of its contract of carriage of the mail. The Government has acquiesced in this arrangement and withdrawn its agent. The mere fact that the railroad continued to carry these mails after its protest, of itself cannot read into a contract a thing which it specifically refused to concede. It may be urged that if it did not desire to carry the mails upon the terms offered it could have refused to carry them. *It can be urged with better reasons that if the Government did not want the company to carry its mails upon the terms offered by the railroad company, it should not have presented them for its carriage by placing them in its charge.*"

With even more force it may be contended that if the Government did not wish to use a 60-foot car for the return trip it was for the Government to decline to accept or to refuse to use such a car for the round trip. Having in fact accepted and used

the car it is bound to pay for such use what throughout this case it admits such car is worth.

Suppose A, the owner of a building with a large storeroom therein, is willing to rent the same at a given sum per month during the year. B wishes to use such storeroom during the odd months for his purposes, but during the even months only requires a storeroom of half the size. He understands what A demands as rent for this store but he demands that he be given the use of the store during the odd months and be furnished another, half the size, for his use during the even months. A declines this proposition, refusing to rent anything but the store he possesses. B goes into possession and remains in possession. Would he not be held to pay the rent fixed by A for the use of the store which he, B, occupied? Is it possible that B can remain in occupancy and dictate his own terms? Has he not in fact agreed to pay the rent which A, as the owner of the premises had the right to fix and demand?

The latter question has been answered in the affirmative by a court of high standing.

In *Thompson* v. *Sanborn,* 52 Michigan, 141, defendant called on plaintiff to be allowed to continue the use of a way connected with an elevator he had purchased from one, Ward, but objected to the price which his predecessor had been paying. Plaintiff refused to reduce the rate and defendant replied that if he paid any rent it would be under protest. He continued to occupy but refused to pay the rent demanded. He was held liable for the amount demanded.

On pages 142 and 143, the court said:

> "The objection that there was no agreement to pay because the defendant manifested his purpose to dissent from the terms is fallacious. The defendant sought the privilege, and the plaintiff offered to grant it at the same price which Ward had been paying. The defendant's own testimony will admit of no other sense. The plaintiff was owner of the property and had the unquestioned right to prescribe the terms on which he would extend the privilege, and when he decided his decision impliedly excluded everything inconsistent. It was not for the defendant to make both sides of the agreement. The proposition was entire. He could decline the privilege on the terms proposed and forbear taking possession, but he could not accept the benefit and at the same time reject the condition. He could not split the offer and appropriate the plaintiff's property, and then turn around and reject the requirement to pay for it. If he could, it would be nothing less than a seizure of one man's property by another on his own terms. The defendant's act was conclusive on him. It was inconsistent with his verbal indication of dissent, and amounted to a positive assent. It was an emphatic waiver of objections, and submission to the plaintiff's terms."

To the same effect see also:

Griffin v. *Knisely*, 75 Ill., 412, 417, 418.

Conway v. *Starkweather*, 1 Denio, 113.

II.

THE HALF LINES R. P. O. CARS ORDER MADE BY THE POSTMASTER GENERAL, EFFECTIVE JULY 23, 1907, WAS MADE WITHOUT AUTHORITY, IS EVIDENTLY CONTRARY TO THE ACT OF CONGRESS, IS OPPRESSIVE AND UNREASONABLE AND, THEREFORE, INVALID.

For the purpose of permitting the Postal Department to rent or hire cars specially adapted for use and intended to be used as traveling post offices on wheels for the handling and distribution of mails in transit, Congress authorized that Department to contract therefor, but fixed the maximum allowance therefor as pay in addition to that received for the transportation of mails certain sums per mile per annum dependent upon the feet in length of the cars used and "for every line comprising a daily trip each way." The Act of Congress explicitly provided what should constitute a line and the basis of pay therefor. It gave no authority to the Postmaster General to amend this law by providing for half car lines, nor did it permit or authorize compensation to be based upon any other unit or standard than "every line comprising a daily trip each way of railway post office cars." The order of the Postmaster General was an attempt at new legislation. The "line" as defined in the Act of Congress is the unit upon which pay was to be based. The Postmaster General could make no valid regulation to divide this unit for pay or to provide a new one. Congress provided a system for comput-

ing the pay and indicated the manner in which the Railway Company was to receive pay for the rent of its cars. The order of the Assistant Postmaster General in attempting to change such basis was not only in excess of the postal regulations, but sought to impose conditions not embraced in the law nor covered by any contract with the Railway Company, either express or implied. Again, the pay of the Railway Company, under the Act of Congress, is to be determined by the length of the car actually furnished and used and not by any arbitrary space therein which the Postmaster General may see fit to designate or use, especially where such designation has reference to the trip of the car only one way. The Act of Congress refers to cars of a given length, specifying the same as "fifty-five feet or more in length," etc., and states that a "line" for which pay or rental should be made comprises a daily trip each way. The order of the Postmaster General is a plain attempt to amend or add to the Act of Congress. That is not permissible.

Morrill v. *Jones,* 106 U. S., 466, 467.
Bruhl Bros. v. *Wilson,* 123 Fed., 957, 958.
Hoover v. *Salling,* 110 Fed., 43.

Again, the oppressive and unreasonable character of the order in regard to half lines demonstrates the wisdom of the President of the Railway Company in noting upon the "Distance Circular" an exception to any future orders which would unjustly affect the compensation of the Railway Company. It is apparent that to comply with the order in ques-

tion upon the route involved would have required the Railway Company to furnish a sixty-foot car one way and a fifty-foot car on the return at the maximum of pay allowed, thus requiring it to haul empty for the accommodation of the Government the respective cars in the opposite direction without pay, or it would require the Railway Company to furnish a sixty-foot car in both directions and, while receiving the maximum pay for the one direction, receive only pay in the other direction fixed for a car of smaller dimensions. The Railway Company never acceded to such an unjust order,—one made after it entered upon the performance of services for the new term. A proper construction of the agreement endorsed upon the "Distance Circular" of the Postal Department, which was returned by the Railway Company, would only require the Railway Company to carry the mails upon the conditions prescribed by law and the regulations of the Department *then* in force. It would hardly be contemplated that a reference to regulations meant anything other than the existing regulations which were before the parties and in view of which the Railway Company was contracting. But however that may be it is evident that it gave no authority to the Postmaster General to impose new and unjust or unduly burdensome conditions.

In *United States* v. *Stage Company*, 199 U. S., 422, 423, the court, speaking upon that subject, said:

> "There must be some limit to the service which can be required without additional compensation, under the authority vested in the

> Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation, would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

In that case the contract involved provided for "new or additional service."

In *United States* v. *Bostwick*, 94 U. S., 66, this court said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case; but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agreed upon."

III.

IF THERE WAS NO EXPRESS AGREEMENT FIXING THE PRICE FOR EACH CAR LINE, YET INASMUCH AS THE GOVERNMENT IN FACT ACCEPTED AND USED 60-FOOT CARS FOR THE ROUND TRIPS, IT WAS BOUND TO PAY THE REASONABLE VALUE THEREOF AND THE RECORD SHOWS THE GOVERNMENT TO HAVE ADMITTED SUCH VALUE OF SUCH CAR LINE TO BE THE MAXIMUM FIXED BY CONGRESS AND THE RAILWAY COMPANY WAS ENTITLED TO DEMAND AND RECEIVE THAT MAXIMUM UNLESS AND UNTIL IT AGREED TO LEASE ITS CARS FOR A LESS SUM, WHICH WAS NOT EITHER CLAIMED OR SHOWN.

Notwithstanding its half lines order, which the Railway Company refused to recognize as valid or binding, the Government continued to accept and use sixty-foot railway post office cars upon this route. That it admitted that $40.00 per mile per annum per car for the round trip was reasonable is apparent from the fact that the Department itself voluntarily allowed such rate in determining the pay for the twenty-two days in July, 1907, and it is also further admitted that for one-half of each daily trip thereafter of the 60-foot cars it allowed pay at the rate of $40.00 per mile. Its deduction on the other half of the daily trip from such rate was not made upon the ground that such 60-foot car was not reasonably worth that rate per mile if used in both directions, but it was upon the arbitrary ground that the Postal Department on the return trip only found it necessary to use fifty feet of the inside space of such a car, and this too in view of the

regulation of the Department which would forbid the Railway Company from using itself the remaining space for its own purposes.

It may be claimed that as the Act of Congress in question fixes a maximum which may be allowed by the Postmaster General as additional pay, that therefore it was necessary for the Railway Company to give some evidence that the reasonable value for the use of its car was that maximum. But even under that view the record contains the admissions of the Government obviating the necessity of any further showing in that respect.

But the maximum prescribed by the Act of Congress was simply a limitation upon the power of the Postmaster General alone to contract. In other words, it prohibited him from contracting to give any greater pay than the maximum. In case he was not able to make an agreement not exceeding the maximum rates provided, then by Section 3999 of the Revised Statutes he was required to separate the letter mail from other mail and contract with or without advertising for carrying the letter mail by horse, express or otherwise.

The Railway Company might no doubt, if it chose, have agreed to let the use of its cars for less than this maximum, but it was not required to do so. It has never assented to less compensation, and its protest on the receipt of reduced pay has preserved its right to insist upon the reasonable value of its cars. That value is fixed as presumptively reasonable, to say the least, by the Act of Congress at $40.00 per mile in the absence of a spe-

cial agreement on the part of the Railway Company to accept a less amount. The Railway Company was entitled to demand the maximum for the use of its car, and in the absence of special agreement by it to accept a less amount, that maximum must be regarded as reasonable, especially in view of the fact that the Government has had the use of these cars during the entire period involved. In view of the maximum fixed by Congress the Government is in no position to claim that the demand of such maximum made by the Railway Company is unreasonable.

There may be some analogy in statutes fixing maximum rates or compensation to be charged by common carriers, though even in such cases in view of the fact that the service undertaken by the Railway Company may be compelled to be performed at reasonable rates, those cases would not be as strong, from a legal standpoint, as the case at bar in which we have on the one hand the Government with all of its power and a private party in the person of the Railway Company whose property is being used.

In holding that a statutory maximum was the measure of the reasonable value of a carrier's service, the full extent of which it might lawfully demand, Lord Watson said in *Manchester, Sheffield & Lincolnshire Railway Co.* v. *Brown*, L. R. 8, Appeal Cases, 715:

> "*Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shewn to be, in certain circumstances, unreasonable, but I

think the *a priori* presumption is in favor of its reasonableness; and here there is evidence from the mouth of one of the parties, the respondent himself, to the effect that the rate is, by some traders, dealers in fish, acted upon."

In the subsequent case of *Great Western Railway Company* v. *McCarthy*, L. R. 12, Appeal Cases, 218, 235, he also stated:

"The reduced rate, plus 10 per cent., is proved to be within the maximum rates authorized by the company's special Acts; and therefore it must, in my opinion, be taken to be in the circumstances of this case, a charge reasonable in amount. In *Manchester, Sheffield & Lincolnshire Railway Company* v. *Brown* (1) I said: '*Prima facie* I am prepared to hold that a rate sanctioned by the legislature must be taken to be a reasonable rate. It may be shown to be in certain circumstances unreasonable, but I think the *a priori* presumption is in favor of its reasonableness.' As that observation has been criticised by the learned Chief Baron, I shall endeavor to explain the meaning which it was intended to convey. *A rate sanctioned by Act of Parliament is a legal rate, which the company can exact from all who employ them to carry*, unless they have disabled themselves from making the charge, by conceding terms unduly favorable to some of their customers. *Until it is shown that they cannot lawfully charge the statutory rate, it must, in my opinion, be regarded not only as lawful but as reasonable.* I do not think a court of law would be justified in entering upon an inquiry for the purpose of ascertaining whether the legislature had authorized an unreasonable rate, and without such an inquiry it would be manifestly unjust to hold that it was unreasonable."

Certainly there is the presumption, in the ab-

sence of a showing to the contrary, that the maximum rate fixed by the legislature is the measure of a reasonable charge, where less has not been specially agreed upon.

In *Beals* v. *Amador County,* 35 California, 624, it was held that the term "legal interest" in a statute providing for the payment of a county debt must be understood as meaning interest at a rate per cent. fixed by law, in the absence of special agreement, at the date of the passage of the Act.

See also:

Archibald v. *Thomas,* 3 Cowen, 284, 289.

Neither can there be any doubt that the Government, in accepting and in fact using a sixty-foot car for the round trips, is bound to pay the fair rental value of such a car whether it wishes to use the entire space therein on the return trip or not. The Government must pay for the kind of car which is in fact furnished and used.

Thus in *Horton* v. *Cooley,* 135 Mass., 589, it was held that if a person was in possession of a building adapted for use as a foundry and machine shop and furnished with power from a water wheel belonging to the owner of the building, he would be liable for the fair rental value of the premises as a machine shop and foundry after notice from the owner that he should hold him liable if he continued such occupation thereafter although he used it for storage purposes only.

It is not pretended there was any evidence or any fact admitted which tended to show that the

maximum charge fixed by Congress was not the measure of the reasonable value of the use of such cars in the absence of an express agreement to the contrary.

From the findings of the court it appeared that the Government itself allowed $40.00 as the rate for a sixty-foot car line. That was certainly allowed up to July 23rd, 1907. So it also thereafter used the maximum rate of $40.00 per mile in computing the use of a sixty-foot car in one direction. It also appears that under the preceding contract, which expired June 30, 1907, the maximum rate allowed by Congress of $50.00 per mile for the use of such car line was fixed by the parties. These facts all show that the maximum rate of $40.00 per mile fixed by Congress for the period in question can be regarded as the only standard in this case for determining the reasonable value of the use of the car line which was in fact accepted and used by the Government.

Vail v. *The Jersey Little Falls Mfg. Co.*, 32 Barbour, 564.

Sidener v. *Fetter*, 19 Indiana, 310.

Smithmeyer v. *United States*, 147 U. S., 343, 359, 360.

The Albert Dumois, 177 U. S., 255.

On *quantum meruit* where the contract has been varied or departed from by the parties during performance such contract is admissible as containing admission of the standard of value, etc.

Reynolds v. *Jourdan*, 6 Calif., 109.

Castagnino v. *Balletta*, 82 Calif., 250.

Shirk v. *Brookfield*, 79 N. Y. Suppl., 225.

Boyd v. *Vale*, 82 N. Y. Suppl., 932.

Schulze v. *Farrell*, 126 N. Y. Suppl., 678.

> tion of the mails, July 1, 1877, it had been agreed that payment should be made for what was done and nothing more. So long as the Postmaster General furnished the mails and the claimant continued to carry them an implied contract existed, which might be terminated at any time by either party. The implied compensation was the reasonable worth of the service, and that might be measured by the previous dealings of the parties for like service and the statutes regulating the same. *The maximum rate fixed by statute would no doubt be considered the reasonable and implied compensation until the Postmaster General should make other terms, with the concurrence, express or implied, of the claimant.*"

In *Texas & Pacific Railway Co.* v. *United States*, 28 Court of Claims, 379, also relied upon by the lower court, it appeared that the railway company had acquiesced for years in the compensation given by the Government which was less than the maximum fixed by law. This acquiescence was made without protest. Subsequently the railway company sued the Government for the difference between the contract price and the maximum prescribed by statute on the theory that the Postmaster General was legally bound to allow the maximum price. The court simply held that the railway company, having made a contract for a lower price, could not compel the Government to pay the maximum price.

It is evident, therefore, that under all the facts found the only conclusion which can be drawn from the same is that the reasonable value of the sixty-foot post office car line on this route was $40.00 per mile.

Conclusion.

The petition of the Railway Company, as required by the Kansas Code of Civil Procedure, sets out the facts as claimed by the Railway Company and concerning which it asked for relief. There was little dispute, if any, as to the facts in the answer filed by the Government and whatever dispute there may have been created by the pleadings was settled by the findings of the court. Under the admissions of the pleadings and the findings of the court it is evident, under the authorities we have cited, that the parties were agreed as to the value of a sixty-foot car line; that as such a car line was in fact accepted and used by the Government it is bound to pay the agreed value for the use of the same. But if there is any doubt upon the point as to whether the minds of the parties met on the question of the value of such a car line then, under the facts found, it is clear that the reasonable value of such car line was that which was fixed in the Act of Congress. In the absence of a special agreement or a showing to the contrary the maximum fixed in the Act of Congress must be accepted as a presumptively reasonable standard for the determination of the rights of the Railway Company.

We, therefore, respectfully submit that the judgment of the Circuit Court should be reversed and that judgment should be entered in favor of the Railway Company for the amount of $4,769.79,

which the court found would be the amount due if the maximum rate were applied.

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APPENDIX.

TREASURY DEPARTMENT,
Office of Comptroller of the Treasury,
March 20, 1912.

The Gulf, Colorado & Santa Fe Railway Company appealed February 3, 1912, from the action of the Auditor for the Post Office Department in settlement No. 192, dated August 7, 1911, in deducting from the amounts otherwise due for transporting mails, fines imposed by the Postmaster General as follows:

Route 150047	$100
Route 150132	50

The Auditor for the Post Office Department under date of February 29, 1912, reports as follows:

"The deductions were made under section 3962, Revised Statutes, viz:

'The Postmaster General may make deductions from the pay of contractors, for failure to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier,'

and the decision of the Supreme Court of the United States in the case of *Allman* v. *United States*, 131 U. S., 31 (12 Comp. Dec., 376) that the decisions of the Postmaster General under that section are not subject to review.

The following sections of the Postal Laws

and Regulations of 1902 are applicable to this case:

'Sec. 1186. * * *

2. Railroad companies, at stations where transfer clerks are employed, will provide suitable and sufficient rooms for handling and storing the mails, and without specific charge therefor. These rooms will be lighted, heated, furnished, supplied with ice water, and kept in order by the railroad company.

3. The specific requirements of the service as to due frequency and speed, space required on trains or at stations, fixtures, furniture, etc., will at all times be determined by the Post Office Department and made known through the General Superintendent of Railway Mail Service.'

'Sec. 1336. In addition to the foregoing general causes, fines will be imposed for the following delinquencies in the different classes of service, to wit: * * *

e. Failure to furnish proper accommodations for the handling, storage and if necessary, the distribution of mails in depots.'

In a letter dated 27th instant, the Second Assistant Postmaster General makes the following statement:

"The Gulf, Colorado & Santa Fe Railway Company, the St. Louis, Brownsville & Mexico Railway Company, the Trinity & Brazos Valley Railway Company, and the Beaumont, Sour Lake & Western Railway Company were using a union station at Houston, Texas, in the spring of 1911 at which a transfer clerk was employed. A small storeroom was provided by the companies for the use of the Department in this station. This room was insufficient in size and was not properly equipped for the needs of the service and demand was made, under Section 1186 by the Division Superintendent of Railway Mail Service on the Union Depot Company for a suitable room properly equipped. The Union Station at Houston is under the control of the

Houston, Belt & Terminal Railway Company, all shares of stock of which company except shares qualifying directors are owned by the Trinity & Brazos Valley Railway Company, the Gulf, Colorado & Santa Fe Railway Company, the Beaumont, Sour Lake & Western Railway Company, and the St. Louis, Brownsville & Mexico Railway Company (Poor's Manual) and for convenience the request for larger room and additional facilities was first presented to that company. The request was not complied with and the Department thereupon took up the matter directly with the tenant lines, informing them that failure to comply with the request within a stated time would be regarded as a delinquency in the performance of the service required of them under the terms of their contracts for the transportation of the mails, for which suitable fines would be imposed under authority of Section 1332 of the Postal Laws and Regulations (R. S. 3962). The companies did not comply with the Department's request, and in the case of the Gulf, Colorado & Santa Fe Railway Company fines of $100 and $50 were imposed on routes 150047 and 150132 respectively for failure to furnish suitable space and facilities in the station at Houston, Texas. The amount of these fines was ordered to be withheld from the compensation for service on routes for the month of July, 1911. These fines were purely disciplinary. The Gulf, Colorado & Santa Fe Railway Company was duly notified of the Department's action and thereafter requested remission of the fines, which was denied.

The appeal is from the action of the Department in imposing these fines. With reference to this it is sufficient to say that it has been held that the decision of the Postmaster General under Section 3962 of the Revised Statutes is not subject to review. (*Allman* v. *The U. S.*, 131 U. S., 31.)

The claimant in this case, however, alleges that it had protested "against furnishing rooms at stations for use of the Post Office Department employees for distribution of mail without payment of rental therefor." The facts with respect to this are that, as the term for which pay had been readjusted on the routes in question would expire June 30, 1910, the company was informed in the spring of that year of the intention of the Department to weigh the mails on its routes, as required by law, for the purpose of readjusting pay for the four year term beginning July 1, 1910. The notice of the intention to weigh the mails was accompanied by a blank form of distance circular, which the company was requested to fill out and return to the Department. One of the purposes of this distance circular is to secure a revised statement of distances for the routes upon which readjustment of pay can be made and also to secure the consent of the company to continue the performance of service in accordance with the Postal Laws and Regulations. As sent out from the Department the distance circular contained a blank form of agreement in the following words:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

The circular was returned by the railroad company, reaching the Department July 1, 1910, and it was observed that the agreement had been modified by the company so as to except Orders No. 165 and No. 412 and protesting against certain regulations and practices of the Department. One of the protests was against furnishing rooms at stations for use of the Post Office Department employees for distribution of mail without payment of rental therefor. In reply to this the company was informed on July 1, 1910, that the Department will not enter into

contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation and further informed it must be understood that in the performance of service the company will be subject, as in the past, to all the postal laws and regulations applicable to the service. On August 15, 1910, the company was further notified that the service would be subject to the usual customs and practices in relation to railroad mail service, as well as to the conditions stated in the Department's letter of July 1st. No further objection was offered by the company. Subsequently an order was issued by the Postmaster General readjusting pay on the routes for the terms July 1, 1910, to June 30, 1914, "subject to future orders and to fines and deductions" and notice thereof was communicated to the company. Copies of these papers are hereto attached.

With regard to the nature of the contract existing between the Department and the company at the time of the imposition of the fines, your attention is called to the opinion of the Comptroller of the Treasury of December 29, 1905 (12 Comp., Dec., 376), in which it was held that the readjustment of compensation on a railroad route does not have the effect of raising a new contract but simply changes the compensation which the company is to receive for the service performed. Under this holding it would appear that the contract which existed prior to July 1, 1910, and which was subject to all the postal laws and regulations, continued thereafter and that the compensation for service on the route merely was changed. The protest was without avail, as the company continued to perform the service after notice from the Department that it must be understood that it was to continue subject to the Postal Laws and Regulations and the usual customs and practices of the Department. *T. & P. Railway Company* v. *United States*, 28 Ct. Cl., 379."

Most of the facts necessary to a determination of the merits of this appeal are contained in the Auditor's letter, *supra*. It appears from this letter, without again setting the facts out in detail, that this company had been for several years carrying the mails in question over the routes in question under its original contract therefor, and had been furnishing, rent free to the United States, a room at its station in Houston, Texas, for the use of a transfer clerk, with heat, light and furniture, supplied with ice water and kept in order by said company. It was furnishing this room in accordance with the provisions in its original contract embodying the clauses of the Postal Regulations set out in said letter, and which read:

> "Sec. 1186. * * *
>
> 2. Railroad companies, at stations where transfer clerks are employed, will provide suitable and sufficient rooms for handling and storing the mails, and without specific charge therefor. These rooms will be lighted, heated, furnished, supplied with ice water, and kept in order by the railroad company.
>
> 3. The specific requirements of the service as to due frequency and speed, space required on trains or at stations, fixtures, furniture, etc., will at all times be determined by the Post Office Department and made known through the General Superintendent of Railway Mail Service."
>
> "Sec. 1336. In addition to the foregoing general causes, fines will be imposed for the following delinquencies in the different classes of service, to wit: * * *.
>
> e. Failure to furnish proper accommodations for the handling, storage, and if necessary, the distribution of mails in depots."

I am unable to find any law which directs the

Postmaster General to require of railroads carrying the mails to furnish rooms in railroad stations or to submit to a fine at his discretion for its failure so to do. No authority supporting such a contention has been furnished by the Postmaster General. It is true the regulations contain such requirements, and when contracts are made making such regulations parts thereof, there being no law forbidding the Postmaster General to make such regulations, they become parts of such contracts and are enforceable as other parts of the contract. (See *Jacksonville, etc., R. R. Co.* v. *United States*, 118 U. S., 626.)

The law as it relates to the carrying of mails provides for a maximum charge for its carriage, but is silent as to the details of the contract for such carriage. But Section 3962, Revised Statutes, as set out in the letter of the Auditor, *supra*, specifically empowers the Postmaster General to make deductions from the pay of contractors for failure to perform service according to contract, and to impose fines for other delinquencies. The amounts deducted from the earnings of this road for the month of July, 1911, by the Postmaster General, to wit: $100 and $50, are deducted for the delinquency of not furnishing a room during said period.

If there were a contract between the United States and the railroad in question covering the period of time for which the deductions were made, which required the company to furnish a room for the use of the Government mail agents in order to distribute the mail at this station without payment of rent therefor, and the company made default for

the period in question, it would follow that I have no jurisdiction to review the action of the Postmaster General as regards such deduction. His order is conclusive under such circumstances. (See *Allman* v. *United States,* 131 U. S., 31.)

But, on the contrary, if the law itself does not require a railroad carrying the United States mails to so furnish a room or rooms for the use of the Government mail agent, or if such provision is not contained in the contract, it is not conceivable that the Postmaster General has any power or authority to so deduct, by way of penalty or discipline, from the amounts otherwise earned by a railroad company for carrying the United States mails. As before stated, I know of no law which declares that railroad companies shall furnish rooms without charge for the use of the railway transfer clerks in depots. The question then to be decided is whether under the facts in this case a contract, either express or implied, existed between the United States and this railway covering the period for which deductions were made, by which this company agreed to furnish a room in the new station at Houston, Texas, for the use of the Government transfer clerks at said point. Such a contract did exist up to the commencement of the fiscal year 1910, by reason of the said railroad company having agreed to accept and perform the mail service upon the routes in question upon the conditions prescribed by law and the regulations of the Department applicable to railroad service. One of the conditions provided by the regulations heretofore set out was that the railroad company should furnish a room in the sta-

tion at Houston, Texas, heated, lighted, etc., for the use of the Government transfer agent, and without the payment of rent therefor.

Before the commencement of the fiscal year 1910 and at a time prior to the completion of the Union Depot at Houston, and when the distance circular was sent to it relative to the compensation for carrying of the mails over these routes for the ensuing period of four years after the 1st day of July, 1910, such distance circulars containing the regulations as regards the furnishing of a room for the transfer clerk, the railroad company agreed to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service, but expressly protested against furnishing rooms at the station for the use of the Post Office Department employees at Houston, Texas, for the distribution of mails, without payment of rent therefor.

A letter from the Second Assistant Postmaster General to this company, under date of May 11, 1911, is set out in the brief of the company, and which reads:

> "As you are no doubt aware, railroad companies are required to perform the service of transporting the mails in accordance with the Postal Laws and Regulations. The second paragraph of section 1186 reads:
>
> 'Railroad companies, at stations where transfer clerks are employed, will provide suitable and sufficient rooms for handling and storing the mails, and without specific charge therefor. These rooms will be lighted, heated, furnished, supplied with ice water, and kept in order by the railroad company.'

"A transfer clerk is employed at the station used by your company at Houston, Texas, and under the regulation quoted above, it is the duty of your company and the other companies using such station to provide quarters therein for his use, which must be equipped as required by this department. This station is reported to be under the control of the Houston, Belt & Terminal Railway Company. The division superintendent of railway mail service in charge of the details of such service at Houston has advised the department that he has been in correspondence with the general manager of the depot company with a view to securing satisfactory quarters in the station, properly equipped for the transfer clerk's use, but that he has not been able to effect a satisfactory arrangement in the matter. He recommends that the tranfer clerk be withdrawn unless suitable facilities be provided at the station, such as a small pouch rack, a small letter case, a desk and table, also space for such equipment and for handling registered mail. The department has no contractual relations with the Houston Belt and Terminal Company with respect to the carriage of mails, but looks to the tenant companies of the station at Houston to provide the facilities therein required by the Postal Laws and Regulations. Before taking action in the matter request is hereby made that your company provide the facilities specified in the foregoing in the station at Houston, Texas, as required by paragraph two of section 1186, P. L. & R., at the earliest practicable date, but not later, than June 18, 1911. Failure of your company to comply with this request will be regarded as a delinquency in the performance of the service required of it by the terms of its contract for the transportation of mails, and suitable fine will be imposed on your company under authority of Section 1332 of the Postal Laws and Regu-

lations. The department will then give consideration to the question of the advisability of discontinuing the employment of the transfer clerk at your station.

For your information in this matter, I desire to state that the appointment and assignment of transfer clerks in important railroad stations involves this department in considerable expense, which it incurs for the purpose of increasing the efficiency of the service by giving a close supervision to the handling at such points of mails in transit, and results in providing skilled employes with special knowledge of the mail service to supervise such handling, thereby relieving transportation companies of such supervision, which would otherwise devolve upon them. The service rendered by the transfer clerk is wholly in connection with the handling of transit mails. If the employment of the transfer clerk at Houston be discontinued, this service will necessarily devolve upon your company and the other companies using the station. You will see that the continuance of his employment will be to the mutual advantage of your company and this department."

The company replied, date not given, as follows:

"The company received your letter for Postoffice Department dated May 19th instant., and prefers you give favorable action to the recommendation before the department to omit assignment of transfer clerks at our Houston depot. For Santa Fe routes 150,047 and 150,132, we will undertake to give the transfer of mails from our arriving trains, and, as due, to our department trains, appropriate attention within the requirements of the postal laws. We will expect notice of date transfer clerks cease."

Shortly after the date of this letter, its date not

being stated, it is claimed and I take it to be a fact that the Postoffice Department dispensed with the transfer clerk at the Houston station in so far as this company was concerned and this company has since the withdrawal of said transfer clerk done its own transferring of mails at this point.

In order to the existence of a contract certain prerequisites are necessary. One of these important prerequisites is a meeting of the minds of the contracting parties. The minds of the parties to this contract for the carrying of the mails in question had evidently met as regards the furnishing of the room at the depot at Houston until the question arose as to its continuance from June 30, 1910, to the 1st of July, 1914.

As before suggested, when the distance circular was sent to it covering the matter of compensation for the last mentioned period, and which contains the regulations in question requiring the railroad company to furnish a room in the new station, rent free, which station was not owned by this railroad company but by a separate corporation, although this company was a large stockholder thereof, it filled in the distance circular providing for the continuance of the contract theretofore entered into, but specificially protested against the regulation which required it to so furnish a room in this Union Station, rent free.

It is alleged and not disputed by the Government that the Postmaster General negotiated directly with the Union Station at Houston for the use of a room therein for the handling and distribution of its ordinary registered mail, but when informed by

said company that it would be expected to be paid a fair rental therefor, the Postmaster General then notified the railroad companies, including this company, that they would be required to furnish rooms, free of cost, for the purpose of the transfer and distribution of the mails at this point.

From all the facts in the case, considering the protests of the claimant against the furnishing of a room in this depot free of charge and the act of the Postmaster General in discontinuing the transfer agent at this point and the railroad company doing its own transferring, it would seem that the meeting of the minds was upon the basis of the railroad company doing its own transferring at this point and not that it should furnish a room during the period from June 30, 1910, to July 1, 1914.

It is insisted by the auditor that no new contract was entered into for the carrying of the mails from July 1, 1910, to July 1, 1914, but that the old contract was simply continued, *in toto* except as to the amount of compensation, and that all the regulations which were a part of said original contract were continued in force and will remain in force so long as the railroad company continues to carry the mails, notwithstanding any protest or objections it may make. He cites as upholding this a contention, 12 Comp., Dec., 376, and the case of the *T. & P. R'y Co.*, v. *United States* (28 Ct. Cl., 379). The cases referred to are easily distinguishable from the one under consideration. In the Court of Claims case the protest was as to the amount of compensation and was made after the full rendition of serv-

ice, and moreover it was fully and completely withdrawn.

These mail carrying contracts are for no specific period of time, especially their renewal, as have been decided by this office, the Court of Claims and the Supreme Court. But it cannot be successfully maintained that because a railroad company sees fit to enter into a contract for the carriage of the mails for a four-year period for a certain compensation, agreeing therein that it will furnish a room rent free for the use of certain Government officials, which it is not required by law to do, that when said contract comes up for an extension of time, be it a fixed or unlimited time, that it must necessarily contain said agreement. If such is the case, why an extension of a contract which needs no extension if it is self-operating in one period as well as the other?

It is sufficient for the purposes of this case to say that the railroad company has never agreed during the period from June 30, 1910, to July 1, 1914, to furnish a room, rent free, at this station. On the contrary, it protested against such an arrangement and undertook to do its own transferring as part of its contract of carriage of the mail. The Government has acquiesced in this arrangement and withdrawn its agent. The mere fact that the railroad continued to carry these mails after its protest, of itself cannot read into a contract a thing which it specifically refused to concede. It may be urged that if it did not desire to carry the mails upon the terms offered it could have refused to

carry them. It can be urged with better reasons that if the Government did not want the company to carry its mails upon the terms offered by the railroad company, it should not have presented them for its carriage by placing them in its charge.

The action of the postal authorities in discontinuing its mail agent at Houston and permitting the railroad company to do its own transferring would seem conclusive of the merits of this case.

The action of the auditor is overruled and he is directed to remove such deductions from the July accounts of said company. A certificate of difference will accordingly issue.

R. J. TRACEWELL,
Comptroller.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 716

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the District of Kansas.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

ROBERT DUNLAP,
WM. R. SMITH,
Attorneys for Plaintiff in Error.

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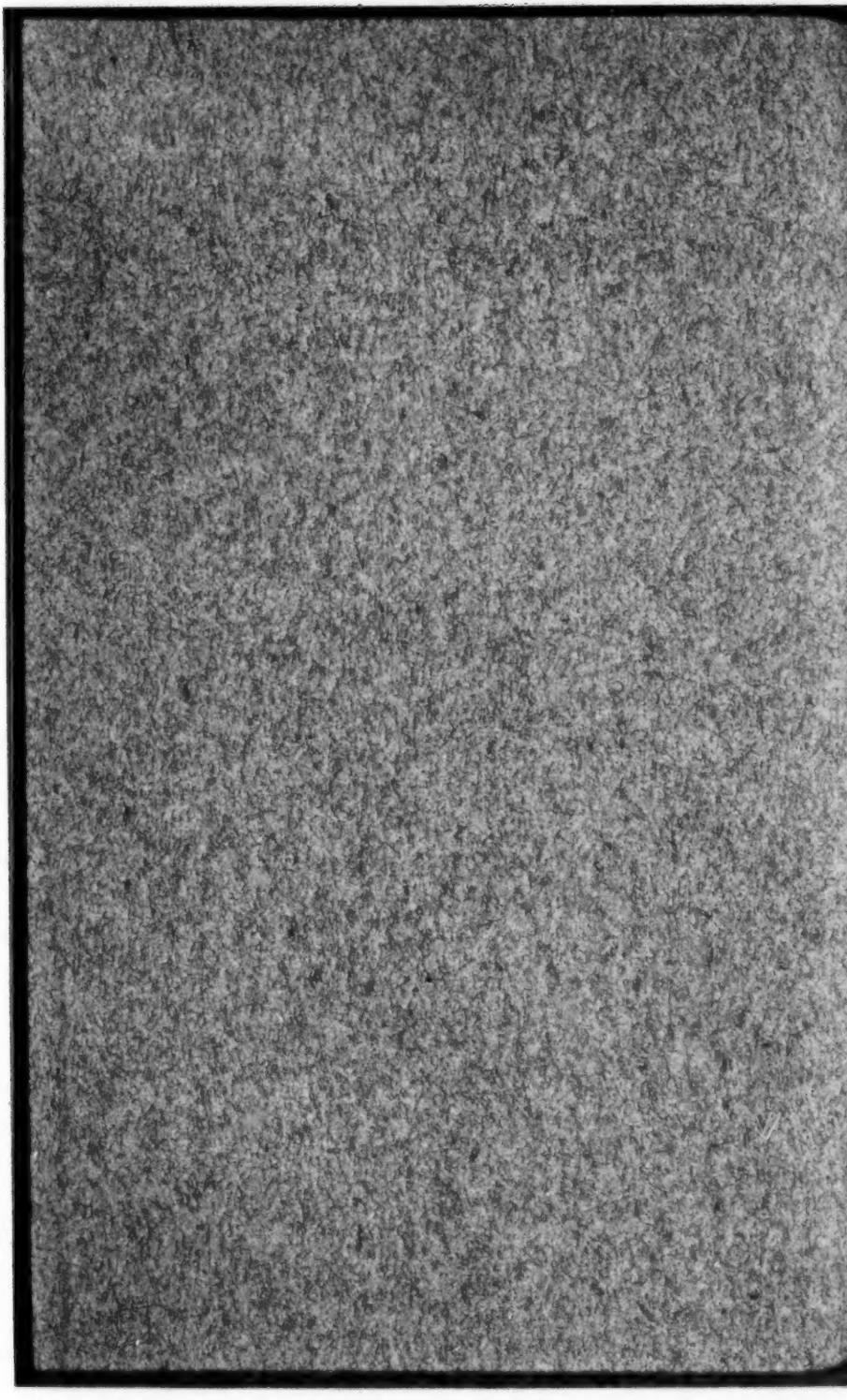

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THE QUESTION INVOLVED.

This suit was begun by the plaintiff in error in the United States Circuit Court for the District of Kansas to recover from the United States the sum of $4,750.55. For the present purposes the statement of facts in our opponent's brief is sufficient. The Circuit Court had jurisdiction under Section 2 of the Act of March 3, 1887. (24 St. L., 505.) After hearing, a judgment was entered in favor of the defendant and a writ of error was sued out from this

court. The bringing of the case by writ of error directly to this court is sanctioned by *Chase* v. *United States.* (155 U. S., 489.) Section 707 of the Revised Statutes provided a special method for reviewing the judgment inasmuch as the amount in controversy exceeds $3,000.00.

Do the provisions of Sections 5, 6 and 14 of the Act of March 3, 1891 (26 St. L., 826), deprive this court of jurisdiction to entertain a direct appeal from the United States Circuit Court to review a judgment in a case involving more than $3,000.00 which has been begun in the United States Circuit Court sitting as a Court of Claims? The contention of the plaintiff in error is that the jurisdiction of this case in this court falls within a special jurisdiction which is recognized in Section 6 of the Act of March 3, 1891, as "otherwise provided by law"; and that the repealing clause in Section 14 of that Act did not affect the special jurisdiction created by Section 707, Revised Statutes.

SECTION 6, ACT OF MARCH 3, 1891, 26 ST. L., 826:

> "Sec. 6. That the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court, and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws,

and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

ARGUMENT.

In two recent cases this court has considered the effect of Sections 5, 6 and 14 of the Act of March 3, 1891, upon the appellate jurisdiction of this court. *United States* v. *Dalcour* (203 U. S., 408), sustained as still subsisting the special jurisdiction of this court created by Section 11 of the Act of June 22, 1860, c. 188 (12 St. L., 85). Again, in *Reid* v. *United States* (211 U. S., 529), this court directly decided that the repealing words of Section 14, Act of March 3, 1891 (26 St. L., 826), do not apply to the special jurisdiction of the District Court sitting as a Court of Claims.

It is thus established that in cases of special jurisdiction the right to a direct appeal to this court, where the jurisdictional amount is involved in the controversy, is unaffected by the Act of 1891. It is noteworthy that it is only in cases involving *general* jurisdiction that this court has decided that the expression, "unless otherwise provided by law," in Section 6 of the Act of March 3, 1891, refers only to provisions of the same Act or contemporaneous and subsequent acts and not to prior acts. (*Lau Ow Bew* v. *United States*, 144 U. S., 47; *The Paquete Habana*, 175 U. S., 677; *Mason* v. *Pewabic Mining Co.*, 153 U. S., 361; *Hubbard* v. *Soby*, 146 U. S., 56.)

Such a classification of cases as falling under special jurisdiction on the one hand and general jurisdiction on the other with a different method of

review for each class, was apparently required in order to give any meaning to the clause, "unless otherwise provided by law." The words quoted, if they referred altogether to changes in appellate practice to be made by Congress in the future, would be useless verbiage. By interpreting the provision in question to save special provisions of law allowing appeals or writs of error in special cases only the policy of the Court of Appeals Act is sustained and the language used by Congress is given a meaning.

Any argument that the Act of March 3, 1891, (26 St. L., 826), must be presumed to apply for the reason that Congress intended to reduce the jurisdiction of this court has no force when considered in connection with cases originating in the Circuit Court and heard there under the Act of March 3, 1887. (24 St. L., 505.) If the contention of the government were correct still under the last paragraph of Section 6 of the Act of March 3, 1891, there would be a right to an appeal or writ of error or review of the case by this court in every suit where the matter in controversy should exceed $1,000.00. Thus, under the theory of the government this case and all others like it could come to this court from the Court of Appeals. But we contend that there is nothing in the law to indicate an intention of Congress to provide that suits against the United States on claims wherein the amount in controversy exceeds $3,000.00 should reach this court by a circuitous course through the Court of Appeals while identical suits brought in the Court of Claims could pass directly from the trial court

to the court of last resort. We submit that the more reasonable view is that the United States by the statutes in question has manifested its will that disputes in which the government is a party and in which the amount is controversy exceeds $3,000.00 shall be decided on appeal by the nation's highest court without passing through intermediate tribunals.

The Government's Authorities.

We are unable to see the application of *United States* v. *Harsha,* (172 U. S., 567), cited by the government. The question there was whether a judgment rendered under the Act of March 3, 1887, in the Circuit Court or District Court should be taken up for review by writ of error *or* by appeal. To what court the case should be carried for review was a question neither argued nor decided. Indeed, this question could not well have been raised because the suit involved a claim amounting to only $482.90 while by Section 707, Revised Statutes, an appeal is allowed to this court only where the amount in controversy exceeds $3,000.00. Since the Harsha case could not in any event have been brought to this court the decision is no authority for contending that this court has no jurisdiction of a case involving the necessary amount.

As to the cases cited by the government from the Circuit Court of Appeals (*United States* v. *Coudert,* 73 Fed., 505, and *United States* v. *Ady,* 76 Fed., 359), both these cases were decided before this court spoke in the Dalcour and Reid cases cited

above. Any authority the Coudert and Ady cases may have possessed when decided was lost when this court held that the repealing provisions of Section 14, Act of March 3, 1891, (26 Stat. L., 826), did not affect special jurisdiction established by law.

We submit, therefore, that both reason and authority favor the jurisdiction of this court and that the motion to dismiss should be overruled.

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GARDINER LATHROP,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 716

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

REPLY BRIEF.

ROBERT DUNLAP,
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GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

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REPLY BRIEF.

Unnecessary prolixity and frequent repetition of the immaterial and irrelevant in our opponent's brief but tends to confuse and becloud the issue. We are not now concerned with the nature and character of the contract concerning the transportation of the mails or the pay therefor as those matters have been apparently adjusted amicably or otherwise.

The simple question is at what rate of compensation is the Railway Company entitled to be paid for

the use by the Government of the sixty foot railway postal cars which were in fact used for the round trip upon the route in question, thus constituting full lines contemplated by the Act of Congress.

Did Congress in providing the maximum rate of compensation for a full car line according to the length of the car used intend to vest arbitrary power in the Postal Department, without the consent of the Railway Company, to change the basis upon which it was entitled to have its pay adjusted for the use of its cars, and was the Postal Department authorized to adopt a different basis which would necessarily involve greater cost or expense upon the Railway Company to comply therewith than to comply with the basis specified in the Act of Congress?

The basis provided in the Act of Congress for pay for the use of such cars is "for every line comprising a daily round trip each way of railway post-office cars." The law then specifies cars of different lengths with the maximum rate therefor as a limitation upon the power of the Department to contract for the use of such cars. The maximum, as will be observed, is fixed for a car of a given length used in making a daily round trip upon the route so that the Railway Company is entitled to pay for the car of the given length actually used in making the round trip or composing the line. The order of the Department in directing a half line necessarily involves either the use of cars of different lengths and an empty haul thereof in each direction, or it involves, as subsequently asserted by the Second

Assistant Postmaster General, the use of a car of a given length in one direction and one-half pay therefor at the maximum rate and the use of the same car on the return trip but only payment therefor according to the amount of space therein which the postal authorities may wish to use. In either case the service required of the Railway Company in the furnishing of its cars is more onerous and burdensome than the service provided for in the Act of Congress and with reference to which Congress prescribed the maximum limit of pay as a limitation on the power of the Postmaster General.

In the lower court and throughout our opponent's brief the idea is suggested that the Postal Department had the power to fix the *space* it intended to use in such car going and coming and to adjust the compensation of the Railway Company not upon the character or length of the car in fact used, but solely upon the amount of the space the Postal Department proposed to use therein either going or coming, the idea of *space* being invented by the postal authorities but not found provided for in the law. In other words, the Second Assistant Postmaster General insists that while a sixty foot car is necessary for use in one direction and the entire space is used in that direction and he is willing to pay one-half the maximum rate therefor fixed in the Act of Congress, yet as he only desires to use fifty feet of space in the same car on its return trip, therefore, he will only compensate the Railway Company for the use of that amount of space in such car and decline and refuse to pay for the ten feet additional

space, although under the postal regulations (Sec. 1179) the Railway Company would not be permitted to use for its own purposes the ten feet of supposed surplus of space in such car without waiving or surrendering its entire claim for any compensation for the use of such car. Thus the Department assumed the character of the little dog in the manger who could not eat hay, but by his incessant barking kept the horses from eating.

As the Railway Company did not assent, but on the contrary objected to the unauthorized order of July 18, 1907, creating half car lines and as sixty foot cars were used in both directions, or full car lines composed of sixty foot cars were used in both directions upon this route, the question as to the right of the Railway Company to compensation for the use of cars of this length rather than for the space occupied by the Department therein does not involve a question of fact, but merely a question of law.

But recurring to the order of July 18, 1907, it will be seen that it does not prescribe the amount of space to be used but on the contrary authorizes "three half lines railway postoffice cars *fifty feet in length, inside measurement*, to supersede three half lines of such cars *sixty feet in length.*" Thus it will be seen that the order simply attempted to create half car lines. Notwithstanding this plain language it is stated on page 23 of opponent's brief:

> "The effect of this order was to reduce to fifty feet the authorized space in railway postoffice cars eastbound and to leave the authorized space in such cars westbound at sixty feet to the car."

That would apparently not only be a misconstruction of the order but also an attempt to amend the statute. That order, however, was not assented to or complied with. Half lines of fifty foot cars were not furnished or used; on the contrary full lines of sixty foot cars were furnished and in fact accepted and used by the Government.

Recurring to the Act of Congress of July 1, 1907, amending Section 4004 of the Revised Statutes (which is correctly quoted on page 3 of our former brief, but somewhat incorrectly quoted on page 27 of our opponent's brief) it will be seen that the rate of compensation for the use of cars is a rate to be based upon the *length of the car making the round trip.* Thus it speaks of "cars forty feet in length," "forty-five foot cars," "fifty foot cars," "cars fifty-five feet or more in length." That surely does not refer merely to the space which the Department wishes to occupy in any such car for a portion of the round trip.

Is it not apparent, therefore, that the Postal officials have misconstrued and misapplied not only the Act of Congress, but the very order of the Department of July 18, 1907? The order is an attempt to change the express provisions of the law and thus change the basis of compensation without the consent of the Railway Company, the other party interested therein. It would, therefore, be regarded as invalid and we might cite, in addition to the authorities cited heretofore, the following:

United States v. *Symonds*, 120 U. S., 46, 48, 49.

United States v. *Barnette*, 165 U. S., 174, 178, 179.

In 2 Willoughby on the Constitution, page 1326, it is said:

> "An administrative officer in the execution of his duties may not change the express provisions of the law even though those provisions no longer seem to be best adapted to secure the end desired by Congress. Thus in *Merritt* v. *Welsh*, 104 U. S., 694, a customs officer was not permitted to substitute a different test from that fixed by Congress for the determination of the quality of imported sugars. 'If experience shows' the opinion declares 'that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the courts, to take the part of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make.' "

It will be seen, therefore, that the contention of the Government is based on the fallacy that because the Postmaster General has the right under Section 4002 to change by agreement the rate of pay for the carriage of mails he also has the arbitrary power to change the car line unit; but such contention disregards Sec. 4004, amended July 1, 1907, in which the language of Congress is explicit in defining car lines and providing the basis of pay therefor. But Congress made the unit a car line with a car of sufficient length to make a round trip over the entire route in twenty-four hours. The question may be asked how, in this case, the Railway Company could perform with a fifty foot car a round trip one-half of which required a sixty foot car?

With reference to the quotation on pages 29 and

30 of opponent's brief from the Annual Report of the Second Assistant Postmaster General, concerning half lines, it will be observed that such half lines were only created by virtue of special agreement or consent of the railway company involved. We, therefore, fail to see the pertinency of anything in that report.

Throughout opponent's brief it is repeatedly stated that the Postmaster General has power to fix the rate of compensation for the use of these cars; that the Act of Congress of July 1, 1907, authorizes a maximum rate or a rate not exceeding those named in the law, and it is asserted (page 30 of opponent's brief):

> "It is a well established principle of law, and confirmed by uniform practice of the executive departments that such authority fixes the maximum rate which may be allowed by the executive officer, *and confers the discretion upon him to fix a lower or minimum rate for the service.*"

And on page 14, speaking of the Post Office Department, it is asserted:

> "It alone, through its executive officers, can fix the terms and conditions, subject to the limitations of the acts of Congress, upon which the service shall be conducted, and define the relations of all persons to the United States who are engaged in such service."

Yet notwithstanding this extraordinary statement we find on page 44 of opponent's brief that the matter of carrying the mails and the furnishing of railway postal cars is purely a matter of voluntary contract which the railway company may or may not enter into, citing *Chicago, Milwaukee & St. Paul Ry.*

Co. v. *United States*, 198 U. S., 389. But if it be a matter of contract surely the Railway Company has a potent voice as to the terms. That it is purely a matter of contract is settled by this court.

Congress itself could not arbitrarily fix against the consent of the property owner the rate of compensation which should only be allowed for the use by the Government of the private cars of a private corporation (*Chicago &c. Ry.* v. *Tompkins*, 176 U. S., 173), much less has it vested in the Postmaster General any such arbitrary power over the property of a private corporation. Instead of the Postal Department having the power to dictate the amount of compensation which should be allowed the Railway Company for the hire of its cars by the Department it would rather seem in consonance with the authorities we have cited in our former brief that it is for the owner of the property to say or dictate upon what terms he will either sell or give the use of that property to another; and that when he specifies his terms and the property is used by such other party notwithstanding any protest or haggling about the price such other party having accepted the use of the property is bound to pay the price demanded by the owner.

In any event it is quite clear, under the evidentiary facts stated in the findings of fact made by the lower court, that the reasonable value for the use of a sixty foot car upon the entire line was the maximum prescribed in the Act of Congress. It is true the lower court in its general opinion disposing of the legal phase of the case, but not in the findings of fact made, stated (Transcript, p. 26):

> "As there is no evidence found in the record of the reasonable value of the service performed by the plaintiff it is manifest the plaintiff cannot recover any amount in addition to that heretofore received by it," etc.

What the court evidently meant was that no witness was produced to testify as to the reasonable value of the use of a sixty foot car upon the line in question. The court, however, overlooked the evidentiary facts laboriously stated in the findings which showed that the Department itself voluntarily allowed the maximum prescribed in the Act of Congress for the use of sixty foot cars for the round trip during the first twenty-three days in July, 1907; and that subsequently the Second Assistant Postmaster General attempted to reduce the compensation not upon the ground that a sixty foot car was not accepted and used by the Government for the round trip or that the maximum rate was not reasonable but solely upon the ground that the full space in such car was used by the Government only one way and but fifty feet of the space in the same car was utilized by the Government on the return trip. The Government did allow on the basis of the maximum rate for one-half of the trip. The Government never disputed that the maximum was not reasonable for a car of the length furnished and used, but attempted to affect the compensation of the Railway Company upon the basis of space occupied for one-half of the trip and which space they were willing to pay for at the maximum fixed by Congress for a fifty foot car. There being no dispute, therefore, in respect to these facts, the price

voluntarily allowed by the Government for a sixty foot car used and constituting a full car line is necessarily conclusive as to the value to be fixed for the use of such cars. So also during the preceding four years the department had allowed compensation at the maximum rate fixed by Congress.

The case of *Wolcott* v. *Yeager*, 11 Indiana, 84, 87, is rather pertinent on this point.

Moreover, it is apparent in the absence of special contract or assent on the part of the Railway Company to accept less compensation than the maximum, that *prima facie* the maximum prescribed in the Act of Congress must be deemed to be in itself the reasonable rate of compensation, as we have shown heretofore.

The Government's alleged offer in respect to half car lines was not accepted or acceded to by the Railway Company either in fact or verbally. It was positively objected to and declined. On the other hand, the Railway Company tendered the use of sixty foot cars for full car lines upon the route in question and such cars were in fact accepted and used by the Government for the full line. So that as a matter of law and irrespective of any other consideration we would have an agreement or obligation on the part of the Government to pay on the basis of full car lines and not on the basis of half car lines, or mere space.

We shall not waste time noticing cases cited from the Court of Claims as we have commented upon such as we deemed necessary heretofore.

With reference to the dictum in *Chicago & Northwestern Railway Co.* v. *United States*, 15 Court of Claims, 232 (quoted on page 39 of opponent's brief) which case was reversed by this court, it would be sufficient to say that the value of that opinion is destroyed by the fact that the court evidently erred according to the judgment of this court. Moreover, a careful reading of that case will show its entire inapplicability. It appeared that after a contract had been made, Congress itself had reduced the pay for the carriage of mails; that the railway company continued to perform the service thereafter. The lower court, proceeding on the assumption that there was no contract and therefore Congress had the right to make the reduction, and that the act of the railway company was an assent thereto, held that as the reduction was made by Congress and not by the Postmaster General a protest to the Postmaster General would be unauthorized and unavailing. It might be suggested that there is probably some difference between a case in which the Department offers terms for the performance of the transportation service which may be presumed to be accepted by the action of the railway company thereunder, and the case in which the railway company offers the use of its cars to the Government for postal services on terms stated by it when such cars are in fact used by the Government though under protest.

However, upon full consideration of every phase of this case it is clear that the Railway Company is entitled to judgment for the balance claimed by it for the use of its cars. The judgment should, there-

fore, be reversed and remanded with directions to enter judgment in favor of the Railway Company for the amount of $4,769.79. (Transcript, page 32, XII finding of fact.)

Respectfully submitted,

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WM. R. SMITH,
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JAMES L. COLEMAN,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE ATCHISON, TOPEKA & SANTA FE Railway Company, plaintiff in error, *v.* THE UNITED STATES.	No. 716.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTICT OF KANSAS.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the United States, by the Attorney General, and moves the dismissal of the writ of error sued out in the above-entitled cause for want of jurisdiction in this court to hear and determine the issues involved, and for cause shows unto the court that the writ should have been sued out from the Circuit Court of Appeals for the Eighth Circuit.

JOHN Q. THOMPSON,
Assistant Attorney General.

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STATEMENT.

This suit was instituted by plaintiff in error in the United States Circuit Court for the District of Kansas under the provisions of section 2 of the act of March 3, 1887 (24 Stats., L. 505), commonly known as the Tucker Act.

The suit was predicated upon a contract entered into with the Post Office Department for the transportation of mails between Chicago, Illinois, and Kansas City, Missouri, for the four years beginning July 1, 1907. Plaintiff proposed to furnish 60-foot mail cars in each direction on a basis of $40 per mile per annum. On and after July 23, 1907, the Post Office Department ordered the operation of three half-lines R. P. O. cars, 50 feet in length, to supersede three half-lines of such cars, 60 feet in length, over said route. Petitioner was duly notified of this change. (R. 6.) The effect of said order, it is alleged, was to require petitioner to operate 50-foot cars eastbound and 60-foot cars westbound; that this was impracticable and would necessitate the purchase of 50-foot cars and to deadhead them and the 60-foot cars in the directions in which their services were not required; that to avoid the expense of purchasing 50-foot cars and the further expense of deadheading or hauling empty such cars westbound and deadheading or

hauling empty said 60-foot cars eastbound, petitioner operated the 60-foot cars in each direction, but nevertheless received pay only for operating 60-foot cars westbound and 50-foot cars eastbound. (R. 7.) Petitioner further alleges that it never consented to the establishment of the so-called half-lines of postal cars between Chicago and Kansas City, and at all times protested against the establishment thereof and the reduced allowance of pay therefor, and claims the difference between the amount allowed and $40 per mile per annum, a total of $4,750.55 (R. 8).

Answer and replication were filed and the case was heard upon the issues thus raised. (Rec., 10, 14, 15.)

The court made findings of fact and conclusions of law and entered judgment for the United States. (Rec., 22, 27, 33, 34.) Thereupon a petition was filed praying that the writ of error issue from this court for the correction of the errors complained of. (Rec., 34.) The writ was allowed as prayed. (Rec., 37.)

No constitutional, jurisdictional, or other like question involved.

From the foregoing statement it may be seen that the only question involved is whether petitioner is entitled to recover upon its contract for certain services in the operation of postal cars. There was no suggestion in the pleadings that the trial court was without jurisdiction; that the

case involved the construction or application of the Constitution; or that the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question. Neither does the assignment of errors raise any such issue, being addressed for the most part to the refusal of the trial court to find certain facts requested by petitioner. (R., 35.)

The issue.

The issue, therefore, is whether this court can take cognizance on appeal or writ of error of a suit arising under the provisions of the Tucker Act of March 3, 1887 (24 Stat. L., 505), where the record does not disclose one of the questions enumerated in section 5 of the act of March 3, 1891 (26 Stat. L., 826), except the suit be one of that class in which the decision of the Circuit Court of Appeals is not made final by section 6 of said act of 1891. In other words, should the writ in this case have not been sued out from the Circuit Court of Appeals?

SEC. 5, ACT OF MARCH 3, 1891 (26 STAT. L., 826).

> SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

ARGUMENT.

In *United States* v. *Harsha* (172 U. S., 567) the Circuit Court of Appeals for the Sixth Circuit certified to this court, among others, the following question of law:

> First question. Can such a judgment rendered under the act of March 3, 1887, in the circuit or district court, be brought before this court [Circuit Court of Appeals] for review in any other mode than as provided in section 707 of the Revised Statutes for the review by the Supreme Court of judgments of the Court of Claims, to wit, by appeal (p. 569).

Mr. Justice Gray, delivering the opinion of the court, answered the question in the affirmative, saying:

> This suit being an action at law under the act of March 3, 1887 (c. 359), the judgment of the District court therein was, as has been directly adjudged by this court, reviewable by the Circuit Court of Appeals upon writ of error (p. 570).

Now, while this court seems to have had in mind more especially the distinction between appeals and writs of error, yet there was a plain recognition that the Circuit Courts of Appeals had been interposed between the trial courts and the Supreme Court in suits arising under the act of 1887 (*supra*).

Three years prior to the decision in the Harsha case (*supra*) the question came squarely before the Circuit Court of Appeals for the Second Circuit in *United States* v. *Coudert*. (73 Fed., 505.) Judge, afterwards Mr. Justice, Peckham sat with Judges Wallace and Shipman. The court, *inter alia*, said:

> The petitioner insists that no writ of error lies to this court from the judgment of the circuit court in an action brought against the Government of the United States under the provisions of the act of March 3, 1887. It was settled in *U. S.* v. *Davis* (131 U. S., 36; 9 Sup. Ct., 657) that an appeal or writ of error lay to the Supreme Court from a judgment against the United States ren-

dered under the jurisdiction conferred upon district or circuit courts by that act; and the contention of the petitioner is that, as the Tucker Act alone furnishes the district or circuit courts with jurisdiction to entertain actions against the United States, it alone controls the right of appeal or review. The act of March 3, 1891, was intended to be a comprehensive statute which should regulate the jurisdiction of the Supreme Court by appeal or writ of error from the district and circuit courts. The fifth section provides six classes of cases in which appeals or writs of error may be taken directly to the Supreme Court from those courts, and which do not include cases arising therein under the act of March 3, 1887; section 6 provides that the circuit courts of appeals shall exercise appellate jurisdiction to review final decisions in the district and existing circuit courts in all cases other than those provided in the fifth section, unless otherwise provided by law; and section 14 provides that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act" are repealed. The Supreme Court, in *Lau Ow Bew* v. *U. S.* (144 U. S., 47; 12 Sup. Ct., 517), has shown that the words of section 6, "unless otherwise provided by law," were not intended to limit the effect of the general repealing provisions of section 14, but "were manifestly inserted out of abundant caution, in order that any qualification of

> the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away, except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act, and be inconsistent with its context and its repealing clause." Immediately after the passage of the act of March 3, 1891, some uncertainty existed in the minds of learned counsel as to which court an appeal or writ of error should be taken in cases arising under the Tucker Act, but this uncertainty has disappeared.

In *United States* v. *Ady* (76 Fed., 359), decided by the Circuit Court of Appeals for the Eighth Circuit in 1896, it appears that defendant in error, who formerly had been United States attorney for the District of Kansas, moved to dismiss the writ "because the Supreme Court alone is authorized to review such a judgment." Judge Sanborn, speaking for the court, said:

> These decisions [which were cited] establish the rule that judgments of the circuit courts under the act of March 3, 1887, *supra,* may be reviewed in the Circuit Court of Appeals, either by appeal or writ of error * * *.

Seemingly opposed to this view is the decision in *Reid* v. *United States* (211 U. S., 529). It is true that the precise question presented here was not in issue there, but rather whether a suit not involving the required $3,000 can be brought directly

to this court at the instance of claimant. Petitioner sought to introduce the constitutional question that he had been deprived of his property without due process of law, thus anticipating any objection on the part of the United States that the case was not properly before this court. The writ was dismissed, but upon the ground that the requisite amount was not involved. The court, speaking through Mr. Justice Holmes, proceeded to discuss the effect of the Circuit Courts of Appeals act upon appeals and writs of error in cases arising under the act of 1887 (*supra*).

Since the passage of the act of 1891 it has been the practice in the great majority of these cases to take the appeal or writ to the Circuit Court of Appeals in all cases except those properly appealable direct to this court under section 5 of the act under discussion. So far the question has never arisen as to whether, in a case in which a decision is made final in a Circuit Court of Appeals under section 6 of the act, a further appeal would lie to this court on behalf of the Government as a matter of right, independent of *certiorari* or certificate.

We submit that the errors complained of should first have been reviewed by the Circuit Court of Appeals, and for this reason the writ sued out from this court should be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

P. M. COX,
Attorney.

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TABLE OF AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE ATCHISON, TOPEKA & SANTA FE Railway Company, plaintiff in error, *v.* THE UNITED STATES. } No. 716.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case was heard by the Circuit Court of the United States for the District of Kansas. The court, upon the evidence, made specific findings of fact set forth on pages 27 to 32, inclusive, of the record, and, upon the facts so found, concluded that the plaintiff was not entitled to recover in the action and that judgment must go for the defendants. (Rec., p. 33.)

For a period of four years next prior to and including June 30, 1907, in pursuance of a contract between the plaintiff and the United States made in accordance with the provisions of the Postal Laws and Reg-

ulations, the plaintiff had transported the United States mails between the city of Chicago, Ill., and the city of Kansas City, Mo., over its line of railroad, known as railroad mail route No. 135098. The compensation for the service of transporting the mails under this contract had been fixed in the manner provided by law, and did not vary during the four years. In addition to this compensation allowed plaintiff for transporting the mails an additional compensation was allowed for furnishing and operating railway post-office cars over the route which was stated in an order of September 23, 1903, and was thereafter many times during said period of four years changed on account of additional authorizations of lines, discontinuances of lines, and additional authorizations of lines of cars of greater length in lieu of cars theretofore authorized, and in each instance the maximum rate of pay prescribed by act of Congress for the space authorized in the cars was allowed and paid. A line of railway post-office cars consists of sufficient cars of the dimensions named to make a round trip over the entire route in 24 hours in the service of carrying the mails for distribution en route. (Rec., p. 27.)

It is the duty of the Postmaster General to readjust the compensation paid for transporting the mails over railroad postal routes and make new contracts with railroad companies for the performance of such service at least once in every four years. (Rec., p. 27.) The compensation to be paid for such service is determined by two factors—the distance the

mails are carried and the average daily weight carried over the entire line. In arriving at the basis for computing the compensation to be paid a railway company for the service of transporting the mails the average daily weight of mail carried by the railway is ascertained by the Government by an actual weighing of the mails and what is known as a distance circular is prepared and signed by the railway company, stating the length of the line, the distance between stations thereon, etc. (Rec., p. 28.) In addition to the compensation paid for the actual transportation of the mails, where the same are carried in cars for distribution purposes 40 feet in length or more, compensation is allowed for the space occupied in such cars as fixed by law and as such space is designated to be used by the Postmaster General by his orders. (Rec., p. 28.)

The new contract term for the service on the route mentioned began July 1, 1907. The service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations, subject, with reference to the rate of compensation to be fixed and paid for transportation under the provisions of Revised Statutes, section 4002, and amending acts, to the order of the Postmaster General to be thereafter made, readjusting such pay, as provided by said acts, based upon the average daily weight of mails carried as ascertained by a weighing of the mails upon said route as provided by law; and subject with respect to the rate of pay to be allowed for railway post-office car service,

to the order of the Postmaster General stating the specific allowance to be made in accordance with the provisions of Revised Statutes, section 4004, as amended by the act of March 2, 1907. (Rec., p. 28.)

As the contract between the plaintiff and defendants for the transportation of the mails over the route in question, unless changed, would terminate June 30, 1907, the Postmaster General, in compliance with his duty to readjust the compensation to be thereafter paid and to make a new contract in reference thereto notified, the plaintiff of the date when the mails would be weighed for the purpose of fixing a basis of such compensation. In February, 1907, the Second Assistant Postmaster General sent to the plaintiff the usual distance circular of the department with request to fill in the blanks with the data required pertaining to the postal route. The distance circular contained printed thereon an agreement clause to the effect that the company agrees to accept and perform the mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad-mail service. In completing the distance circular the plaintiff added to this agreement clause by typewriting an exception to certain orders of the department, after which it was signed by the plaintiff and returned July 22, 1907, reaching the department July 24, 1907. Accompanying the transmission of this circular the president of the plaintiff company addressed to the Postmaster General a letter under date of July 1, 1907, containing various protests and the reasons for exe-

cuting the agreement. The protests material to this controversy were against furnishing space and facilities for distributions of mails on trains and for traveling post-office purposes without space pay therefor. The letter further stated that it constituted an exception to any future orders or regulations which in the opinion of the company might be unjust or which might unfairly reduce the compensation for its services. (Rec., pp. 28 and 29.)

Under date of October 3, 1907, the Second Assistant Postmaster General acknowledged the receipt of the distant circular and the letter above referred to, and replied, noting the exceptions of the plaintiff and stating with reference thereto that the department would not enter into any contract with any railroad company by which it might be excepted from the operation or effect of any postal law or regulation, and that it must be understood that in the performance of service from the beginning of the contract term, July 1, 1907, and during the continuance of such performance of service the company would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service. (Rec., p. 29.)

The plaintiff continued to perform service on and after July 1, 1907, and on July 18, 1907, was operating over the mail route railway post-office cars 60 feet in length, sufficient to constitute three full lines, such lines having been duly authorized theretofore. On that date, however, the Postmaster General made an order changing the authorization of space for

which additional payment could be made, the effect of which was that from July 23, 1907, three half lines of railway postal office cars 50 feet in length, inside measurement, were authorized to supersede three half lines of such cars 60 feet in length over the route. This left the authorized space in such cars westbound at 60 feet to the car, and in cars eastbound at 50 feet to the car. The company was duly notified of such restatement of authorized space, and, on receipt of the notice, objected to the change in authorization and reduction of pay. The department replied, under date of July 25, 1907, that the order was made in accordance with reports showing that no greater space than that authorized was needed for postal requirements in the cars in question. By letter of July 29, 1907, the plaintiff further questioned the reason for reduction in pay below the maximum rate fixed by law, and, by letter of August 3, 1907, the department replied, stating that the order in question was made strictly in accordance with the practice with reference to the authorization of railway post-office car space. By letter of August 3, 1907, the plaintiff protested against the effect of the order in question, and the department, by letter of August 19, 1907, replied, reaffirming its position and stating that there was nothing to be added "except to make it clear that the department can not under any circumstances pay for more space than authorized by the regular orders." During all this time, and subsequent to the receipt of the notification from the department last above referred to, the plaintiff con-

tinued to operate the cars and carry the mails and the clerks therein. (Rec., pp. 29 and 30.)

The weighing provided by law having been made, the department, on November 20, 1907, in accordance with the weights of mails as ascertained by the department and the distance as stated in the distance circular returned by the plaintiff, notified plaintiff of the compensation fixed for transporting the mails, and for the space require and authorized in railway post-office cars under the order of July 18 until the same should be readjusted. (Rec., p. 30.)

By letter of December 2, 1907, the plaintiff acknowledged receipt of the copy of the adjustment order and protested against the half lines of railway post-office cars and the rate fixed therefor. To this the Second Assistant Postmaster General, by letter of December 14, 1907, replied calling attention to his previous letter upon the subject and advising the plaintiff that the department could not pay more for the performance of service than the rates of compensation named in the orders adjusting the pay and in accordance with the orders authorizing railway post-office car space; and in reply to a further statement of plaintiff as to its reservation of right to claim pay for additional facilities, further statement of the Second Assistant Postmaster General was made to the effect that the rate of compensation for railway post-office cars is fixed upon the authorization of space, such authorization being in accordance with the practice of the department and the needs of the postal service, and that the department will not

pay any additional compensation for any other weights of mails or facilities claimed to be furnished by the company, except as duly ascertained and authorized by the department, and that the continuance of the performance of service upon the route must be with this understanding. The plaintiff replied on March 27, 1908, that the statements of the Second Assistant Postmaster General would not be accepted as a legal denial of any consistent right or claim the company may properly present. (Rec., p. 31.)

Upon the receipt of the warrant for the September, 1907, quarter the Washington attorneys for the plaintiff stated that it was accepted under protest, to which the Second Assistant Postmaster General replied that notwithstanding the protest any service performed by the company must be with the distinct understanding that the amount named in the readjusting order is all that can be paid for the service. (Rec., pp. 31 and 32.)

During all the time the plaintiff continued to perform the service of transporting the mails and furnishing railway post office car space, and it has received compensation for such space in compliance with the order of the Postmaster General of July 18, 1907, and plaintiff has at all times protested against the authority of the Postmaster General to make such order. (Rec., p. 32.)

The plaintiff in the construction of its line of railway from the city of Kansas City, in the State of Missouri, to the city of Chicago, in the State of

Illinois, was not aided by any grant of land or other property made thereto by the defendants. (Rec., p. 32.)

ARGUMENT.

The foregoing statement is in accordance with the findings of fact or special verdict filed by the court and set forth on pages 27 to 32, inclusive, of the record. Upon these facts the court reached a conclusion of law that the plaintiff's line of railway between the city of Kansas City, in the State of Missouri, and the city of Chicago, in the State of Illinois, was not constructed in whole or in part by any grant of land or any other property made by Congress on the condition that the mails should be transported over the same at such price as Congress should by law direct, and that the plaintiff is not entitled to recover in the action, and judgment must go for the defendants. (Rec., p. 33.) The last conclusion is assigned by the plaintiff as error. Other assignments are also made, but none of them can properly be brought before this court.

Analysis of argument for plaintiff in error.

The first main proposition submitted by the plaintiff in error is that the parties were agreed upon the value of 60-foot railway post office car lines as the maximum rate prescribed by Congress, and that as such car lines were in fact used by the Government it must be held to have agreed to pay that value.

This proposition assumes and alleges facts which were not found by the court below and therefore can not be considered here. There is nothing in the findings of fact to the effect that it was agreed between the parties that the value of 60-foot postal car lines was the maximum rate prescribed by the statute. The issues presented here are wholly issues of law arising upon the facts as found by the court below and admitted, if at all, in the pleadings, and no question can be raised here, nor was such raised by assignment of error, as to the existence of this alleged fact which the court did not include in its findings and which is not admitted in the pleadings.

All argument, therefore, submitted by plaintiff in error to show that the maximum rate fixed by the statute for pay for a full line of railway post-office cars is the value of the service rendered by plaintiff in error is irrelevant. The cases cited in support of plaintiff's contention may therefore be dismissed from consideration in this court. They would be relevant only in a consideration by the trial court of the question as to what is the value of the service rendered, in the absence of some specific and direct evidence thereon.

The second main proposition of the plaintiff in error is that the half-line railway post-office cars order complained of was made without authority was evidently contrary to the law, and was oppressive and unreasonable. This contention of the plaintiff in error is fully and specificially answered in the argument presented hereinafter in behalf of the de-

fendants in error. However, it is desired to note the fact here that the cases cited to support the theory that the order was in effect a change in the law are not in point.

These cases of *Morrill* v. *Jones* (106 U. S., 466), *Bruhl* v. *Wilson* (123 Fed., 957), and *Hoover* v. *Salling* (110 Fed., 43) are all cases where some department of the Government attempted by an order or direction to limit or curtail some right guaranteed by a law of Congress to the whole people. For instance, in the first-mentioned case the statute provided that animals specially imported for breeding purposes are not subject to duty. The Secretary of the Treasury issued a regulation that before admitting such animals free the collector "shall be satisfied they are of superior stock, adapted to improving the breed in the United States." The Supreme Court held that the Secretary could not by his regulation alter or amend a revenue law. The statute clearly includes animals of all classes. The regulation sought to confine its operation to animals of "superior stock." This was manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. The other cases are similar in principle.

The case at bar is clearly distinguished from this class of cases. Congress had provided that additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars at a rate not exceeding certain rates named in such statute for cars of certain lengths. This statute does

not guarantee to railroad companies an absolute allowance for such cars nor an allowance of the maximum rates fixed by law in case such cars are authorized. As will be shown hereinafter, the law is merely permissive and fixes maximum rates, allowing the Postmaster General full power and discretion to fix minimum rates for such space as he may authorize, in accordance with the actual needs of the service.

On the merits of the case the whole theory of the plaintiff in error is that the railroad company was in a position to dictate to the United States the terms upon which the mail service should be performed by it, and in support of the theory claims that during the controversy as to the terms of the contract the company furnished a 60-foot car, which was accepted and used by the department, thus practically waiving or abandoning the order regarding half-car lines, and that if the United States did not wish to use the 60-foot car for the return trip it was for the Government to decline to accept or to refuse to use such a car for the round trip.

This theory is the reverse of the sound principle which must govern the subject of the conduct of the mails by the United States and the doctrine as laid down by the courts with respect to the same. In passing it should be noted that the claim that the department "accepted" the 60-foot cars in the sense that plaintiff in error evidently intends its brief to be understood, is not correct. There is nothing in the findings of fact to justify such statement, but quite the opposite. Finding 5 (Rec., p. 28) is to the effect

that in addition to the compensation paid for actual transportation of the mails where the same are carried in cars 40 feet in length and more, compensation is allowed for the *space* occupied in such cars as fixed by law and as such *space* is designated to be used by the Postmaster General by his orders; and in the other findings (Rec., pp. 30 to 32, inclusive) it is repeatedly set out that the department authorized only the space stated in its orders, and stated that it would pay for no other.

In support of the theory that the Government in the conduct of the mail service must accept the terms of the railroad company upon which such service is to be performed the plaintiff in error cites a recent opinion of the Comptroller of the Treasury, which opinion it has set forth in full as an appendix to its brief. The special quotation from this opinion set forth in the brief of plaintiff in error propounds the doctrine that if the Government did not want the company to carry its mails upon the terms offered by the railroad company, it should not have presented them for its carriage by placing them in its charge; and plaintiff in error goes further and states that with even more force it can be contended that if the Government did not wish to use a 60-foot car for the return trip it was for the Government to decline to accept or to refuse to use such a car for the round trip.

This doctrine, as above stated, is the direct reverse of that sound principle which lies at the foundation of the governmental function of the Post Office De-

partment. By specific grant the Constitution has conferred the power upon Congress to establish post offices and post roads, and in the exercise of this power and in the conduct of the postal service the Post Office Department is performing a governmental function. It has complete control of the conduct of the postal service in the exercise of one of the sovereign powers of the people. It alone, through its executive officers, can fix the terms and conditions, subject to the limitations of the acts of Congress, upon which the service shall be conducted, and define the relations of all persons to the United States who are engaged in such service. Such persons or corporations can not dictate to the United States or to their representative, the Post Office Department, the terms and conditions upon which the mail service shall be conducted. Furthermore, a railroad company carrying the mails is not a common carrier with reference to such mails, but sustains a specific relation toward the United States which has been well defined and stated by the Circuit Court of Appeals in the case of *Bankers' Mutual Casualty Company* v. *Minneapolis, St. Paul & S. S. M. Railway Company* (117 Fed., 434). In that case the court say, inter alia:

> It seems clear to us that defendant in error was a public agent of the United States in relation to carrying the mail for the reason that the Constitution of the United States conferred upon it the power to establish post offices and post roads, and it has power so

> granted by the people as one of the sovereign powers to be exercised by the General Government exclusively. By virtue of this grant of power, the United States has always, through its Post Office Department, assumed the exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so, the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations which are engaged in the carriage or delivery of the mail by authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function.

Clearly, the United States is the employer and, like any other employer, has the right to state the terms upon which the employment shall arise. Where the railroad company accepts the terms fixed by the United States, whether by express words or by acquiescence and performance, an agreement is effected upon the terms proffered by the Government, and the railroad company can not be heard to urge a contract with other and different terms of its own making. In the case of the *Texas & Pacific Railway Company* v. *United States* (28 Ct. Cl., 379) the court held that a contract is effected when a railroad company assents to or performs mail transportation upon the terms stated by the Postmaster General. Of like effect is the case of the *Minneapolis & St. Louis Railway Company* v. *United States* (24 Ct. Cl., 350) in which it was held that the orders of the Postmaster

General were offers of the business at the prices therein stated and that the railroad company by taking and carrying the mails accepted their terms.

If the company did not choose to accept the terms of the Postmaster General it had the privilege to decline to perform the service, but it could not, by continuing to perform the service, force its own terms upon the United States.

In further support of its theory the plaintiff in error cites Revised Statutes, section 3999, which provides that if the Postmaster General is unable to contract for carrying the mail on any railroad route at the compensation not exceeding the maximum rates provided or for what he may deem a reasonable or fair compensation he may separate the letter mail from the other mail and contract for their transportation separately by horse express or otherwise, etc. This is a provision of the act of June 2, 1872, and followed a provision in the same act now stated as Revised Statutes, section 3997, authorizing the Postmaster General to arrange the railroad routes into three classes, etc. These provisions, although brought forward in the revision of 1878 of the statutes, were practically superseded by the act of March 3, 1873 (R. S., sec. 4002), and the amending statutes authorizing the readjustment of railroad mail pay on the basis of the average daily weights and upon an entirely new scale of prices. Whatever may be the force of these provisions at this time the section is evidently cited by the plaintiff in error in support of the theory that the railroad company can dictate

the terms for the performance of mail service and that if the Postmaster General does not agree to them Congress has given him the power to make other contracts. The defendants in error on the other hand contend that, although the Postmaster General has power to make other contracts after the terms which he names are effectively rejected by the railroad company, the power resides in him to fix the Government's terms upon which mail carriers shall perform service, as a necessary incident to the exercise of the govenmental function of carrying the mails and that the railroad company may either accept or decline those terms, but that it can not object to the terms and continue to perform the service and thereby impose its own terms upon the United States without their consent.

Argument in support of contention of defendants in error.

The questions presented by the facts found by the lower court are:

1. Was the order of the Postmaster General issued in violation of the terms and conditions of an express contract between the plaintiff and defendants providing for the transportation of mails over the route in question and providing compensation to plaintiff for space occupied by the Government in railway post-office cars for distribution purposes?

2. Did the Postmaster General have the authority to make the order in question allowing for specific space in railway post-office cars for distribution pur-

poses at a rate below the maximum provided by law for full lines of railway post-office cars?

3. Did the actual performance of service after the issuance of the orders complained of, although objected to, but with notice that the department would not pay for any greater space than that authorized, effect an acceptance, the company having the right and privilege of declining to perform service if the terms offered were not satisfactory?

I.

The making of the order by the Postmaster General not a violation of the contractual relations.

NATURE OF THE CONTRACT.

In order to determine whether the rights of the plaintiff were violated by the order of the Postmaster General, it is necessary to consider carefully the relation that existed between the plaintiff and the defendants prior to and at the time of the making of the order in the matter of transporting the mails on the route in question.

In pursuance of the contract between the plaintiff and the defendants, made in accordance with the provisions of the Postal Laws and Regulations, the plaintiff had transported the United States mails between the city of Chicago, Ill., and the city of Kansas City, Mo., over its line of railroad known as mail route No. 135098 during the four years next prior to and including June 30, 1907. The compensation for the service of transporting the mails under this contract

had been fixed in accordance with the provisions of law—that is, Revised Statutes, section 4002, and the amending acts—upon the basis of the average daily weight of mails carried over the whole length of the route. (Rec., p. 27.) The basis of computing the compensation to be paid for transportation was the average daily weight of mails carried, ascertained by an actual weighing of the mails by the Governemnt and the application of the distances certified to by the plaintiff upon its distance circular returned to the department. (Rec., p. 28.) In addition to the compensation allowed the plaintiff based upon the average daily weight of mails carried, an additional compensation was allowed for furnishing and operating railway post-office cars over the route for distribution purposes, which rate of compensation had been stated in an order of September 23, 1903, and which had many times during the four years been changed on account of changes in the service. These changes resulted in authorizations of additional lines, of discontinuances of lines, and of additional authorizations of lines of cars of greater length in lieu of cars theretofore authorized, and for such authorizations compensation was allowed for the space occupied in the cars furnished, as such space was designated to be used by the Postmaster General by his orders. Under such circumstances the plaintiff could operate any size cars it might desire, provided only that such cars contained at least the amount of linear space authorized. A line of railway post-office cars consists of sufficient cars of the dimensions named to make a round trip

over the entire route in 24 hours in the service of carrying mails for distribution en route. (Rec., p. 27.)

Therefore, the contract which existed between the plaintiff and the defendants during the term prior to and including June 30, 1907, was expressed by the orders of the Postmaster General and the statutes and regulations governing the postal service, as in the case of the *Minneapolis & St. Louis Railway Company* v. *The United States* (24 Ct. Cls., 350), where it was stated that the orders of the Postmaster General and the business of carrying the mails are subject to the statutes and regulations of the department which, with the usual and ordinary customs and practices of the department in relation to railroads and mail service, constitute the terms of the contract.

The above-stated relations were those which existed between the plaintiff and the defendants on June 30, 1907, the end of the term for which adjustments had theretofore been made in accordance with the provisions of law. The new contract term for service on the route began the next day, July 1, 1907. The service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations and subject, with reference to the rate of compensation to be fixed and paid for, the transportation of the mails under the provisions of Revised Statutes, section 4002, and the amending acts, to the order of the Postmaster General to be thereafter made readjusting

such pay as provided by such acts, based upon the average daily weight of mails carried, to be ascertained by an actual weighing of the mails upon the route as provided for by law; and subject, with respect to the rate of pay to be allowed for railway post-office car service, to the order of the Postmaster General stating the specific allowance to be made in accordance with the provisions of Revised Statutes, section 4004, as amended by the act of March 2, 1907. (Rec., p. 28.)

THE DISTANCE CIRCULAR AND PROCEEDINGS THEREON.

For the purpose of ascertaining, stating, and fixing the pay for the transportation of the mails upon the route in question for the new term beginning July 1, 1907, the Postmaster General, in compliance with his duty to readjust the compensation as provided by law, ordered a weighing of the mails on the route for the purpose of fixing a basis for such compensation, and notified the plaintiff of the date of such weighing, and on February 19, 1907, sent to the plaintiff a copy of the department's distance circular, with request that it be filled out, furnishing the data required respecting the postal route and that it be returned to the department. (Rec., p. 28.)

The distance circular contained a printed clause of agreement thereon, reading as follows:

> The company named below agrees to accept and perform mail service on the conditions prescribed by law and the regulations of the department applicable to railroad mail service.

The plaintiff added, in typewriting, to this printed agreement an exception to certain orders of the Postmaster General, signed the circular under the hand of its president, and transmitted it to the department on July 22, 1907. The circular, so executed, was received at the department on July 24, 1907. Accompanying the circular was a letter containing various protests, among which was one against furnishing space and facilities for distribution of mails on trains and for traveling post office purposes without specific space pay therefor. (Rec., pp. 28 and 29.)

Under date of October 3, 1907, the Second Assistant Postmaster General replied to the letter of protest and to the exception stated on the distance circular, and specifically informed the plaintiff with respect thereto that the department would not enter into any contract with it by which it might be excepted from the operation or effect of any postal law or regulation, and that it must be understood that in the performance of service from the beginning of the contract term, July 1, 1907, and during the continuance of such performance of service, the plaintiff would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service.

THE ORDER COMPLAINED OF.

While the condition above described was continuing, the service being performed by the plaintiff after the 1st of July, 1907, under the provisions of the Postal Laws and Regulations subject to a restatement

by the Postmaster General as to the rate of compensation to be allowed therefor and before the filing of the distance circular as above stated, the order of which plaintiff complains was made on July 18, 1907. At that time the plaintiff was operating over the route railway post-office cars 60 feet in length sufficient to constitute three full lines in accordance with authorizations made during the preceding term. On that date the Postmaster General made the following order:

> From July 23, 1907, authorize three half lines railway post-office cars 50 feet in length, inside measurement, to supersede three half lines of such cars 60 feet in length over route 135,098, Chicago, Ill., and Kansas City, Mo.

The effect of this order was to reduce to 50 feet the authorized space in railway post-office cars eastbound and to leave the authorized space in such cars westbound at 60 feet to the car. (Rec., pp. 29 and 30.) The reason for and purpose of this order was the same as had been the basis for all previous orders of the Postmaster General authorizing car space on the route in question, namely, to state such authorization in accordance with the exact needs of the service for distribution purposes. (Rec., pp. 30 and 31.) During the preceding term the authorized space had been by order changed from time to time.

CONTRACT RIGHTS NOT VIOLATED.

It will be entirely clear from the above that no contract rights of the plaintiff were violated by the order made by the Postmaster General. After the

30th of June, 1907, and beginning with the new contract term there was no express contract between the parties which defined the terms upon which the service should be performed and paid for. The facts as found by the court are that with the termination on June 30, 1907, of the rates of compensation fixed for the preceding term the plaintiff continued to perform the service for the defendants under the terms of the Postal Laws and Regulations subject, with reference to the rates of compensation, to the orders of the Postmaster General to be thereafter made. As to the compensation for transportation, the rate was to be based upon the average daily weight of mails carried and the statutory rates fixed by law and expressed by the order of the Postmaster General making the readjustment, and as to the compensation for car space subject to the order of the Postmaster General stating the specific space in cars required for the distribution of mails en route and the rate of compensation fixed by him therefor.

With the return of the distance circular by the plaintiff a protest was made by the company against furnishing space and facilities for distribution of mails and for traveling post-office purposes without specific pay therefor. This protest by the plaintiff was wholly ineffectual, as it was met by the Post Office Department with the oft-repeated statement that it would not enter into any contract with the plaintiff whereby it might be excepted from the operation of any postal law or regulation, and that in the performance of service from the beginning of the contract

term and thereafter it must be understood that the plaintiff would be subject to all the postal laws and regulations then or to become applicable during the term, and that the Postmaster General would pay for the service no greater amount than that fixed by his orders. The effect of these protests and the replies of the department, together with the continuance of the service by the plaintiff thereafter, will be further considered hereafter.

The plaintiff contended in the court below that it was aided in the construction of its road by lands granted by the Government, and as a condition of the grant of such lands the plaintiff was obliged to transport the mails for the Government over the route in question, and that it was not free to decline to perform such service. As to this contention the court below has found that upon the facts stated the plaintiff was aided by grants of land in the construction of its line of railway through the State of Kansas from the city of Atchison to the Colorado line, yet the route in question extends from the city of Kansas City, in the State of Missouri, to the city of Chicago, in the State of Illinois; that this last portion of plaintiff's line of railway was constructed long after its Kansas line, and that its construction was not aided by the Government through grants of public lands or otherwise (Rec., p. 24); and upon the authority of the case of *United States* v. *Alabama Great Southern Railroad Company* (142 U. S., 615), affirming the decision of the Court of Claims in the same case in 25 Court of Claims, 30, reaches a conclusion of law that the road

over which the mail route in question was stated is not a land-grant road within the meaning of section 13 of the act of Congress of July 12, 1876. (19 Stat., L., 82.)

The road in question not being a land grant aided railway, the lower court further holds on the authority of the *Eastern Railroad Company* v. *United States* (129 U. S., 391), and *Minneapolis & St. Louis Railway Company* v. *United States* (24 Ct. Cls., 350), that the plaintiff was under no obligation to the Government to carry the mails or furnish the space in cars for railway post office service, but was free to carry the mails or to decline to carry them or to contract with the Government for the performance of such services or to decline to contract.

II.

The Postmaster General had power to make the order complained of authorizing "half car lines" and to subsequently fix the pay for the railway post office car service at a rate below the maximum provided by law for full lines of railway post office cars.

THE STATUTES AND REGULATIONS GOVERNING ALLOWANCE OF RAILWAY POST OFFICE CAR PAY.

At the time the order of July 18, 1907, complained of was made the Postmaster General's authority for making allowances for railway post office car service was found in section 4004, Revised Statutes, as amended by the act of March 2, 1907 (34 Stat. L., 1212), as follows:

> Additional pay may be allowed for every line comprising a daily trip each way of rail-

way post-office cars, at a rate not exceeding $25 per mile per annum for cars 40 feet in length; and $30 per mile per annum for 45-foot cars; and $40 per mile per annum for 50-foot cars; and $50 per mile per annum for 55 to 60 foot cars. (R. S., sec. 4004.)

After July 1, 1907, additional pay allowed for every line comprising a daily trip each way of railway post-office cars shall be at rate not exceeding $25 per mile per annum for cars 40 feet in length; and $27.50 per mile per annum for 45-foot cars; and $32.50 per mile per annum for cars 55 feet or more in length. (Act of Mar. 2, 1907, 34 Stat L., 1212.)

The act of March 3, 1879, section 4 (20 Stat. L., 358) provides:

> All cars or parts of cars used for the Railway Mail Service shall be of such style, length, and character, and furnished in such manner, as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated and lighted, by and at the expense of the companies.

The postal regulation in force at that time defining railway post-office car lines, and relating to space therein which could be paid for, was as follows:

> A line consists of a car or cars sufficient to perform a daily round trip over the whole route, and full pay therefor will only be allowed where such car or cars are accompanied by an employee or employees of the postal service in the discharge of the duties of distributing and handling the mails, as contem-

plated by the use of such cars in the service. (Sec. 1179, par. 3, Postal Laws and Regulations.)

From the above it will be seen that the allowance which may be made within the discretion of the Postmaster General for railway post-office car lines is in addition to the compensation fixed by his order under the provision of Revised Statutes, section 4002, and its amending acts (P. L. & R., sec. 1164, edition of 1902, and supplement of 1907) for the transportation of the mail themselves, and is only authorized when the linear space needed for railway post-office purposes (that is, for the distribution of the mails by the clerks en route) equals 40 feet or more. When such linear space in the car does not equal 40 feet the company is required to furnish apartment space in cars, in which the mails may be distributed, without additional compensation, as one of the conditions upon which its pay for transportation under the act above referred to is fixed. (R. S., sec. 4002.)

It appears further that additional compensation may be allowed for every line of cars, and that a line of cars consists of sufficient number to perform a daily round trip over the whole route. Furthermore, full pay for lines may only be allowed under the Postmaster General's regulations where such car or cars comprising such line are accompanied by an employee or employees engaged in the distribution and handling of the mails, as contemplated by the use of such cars in the service; that is to say, they may be paid for at the

maximum rate only where the maximum space is needed and used for distribution purposes.

In recognition of the principle that, under the statute conferring discretionary power upon the Postmaster General to make an allowance and providing a maximum for such allowance, it is proper for the Postmaster General to authorize and pay for only such space in the cars as is needed and used in the service for the distribution of the mails, there arose in the service a practice known as the authorization of half-car lines. The Second Assistant Postmaster General states, in his annual report for 1908, the origin and nature of these half-car lines as follows:

> From the passage of the law in 1873 allowing additional compensation for railway post-office cars, to the year 1897, authorized half lines of railway post-office cars were unknown in the service. Thereafter a practice gradually arose of making agreements with railroad companies for the authorization and operation of half lines in cases where the postal needs in one direction warranted the authorization of such cars, but in the opposite direction did not. It became the practice to secure an agreement from the railroad company, when practicable, for the authorization and operation of a half line where these conditions arose.
>
> Half lines arose also where, after authorization of a full line of railway post-office cars, the needs of the service in one direction grew faster than those in the opposite direction.

> In such a case it was customary to offer the company pay for additional space in one direction only. If accepted by the company, this converted the full line into two half lines with different rates of pay. It has also been customary to deduct the pay for a car run where the railway postoffice car was returned deadhead—that is, without mail or clerks therein. (Report of Second Assistant Postmaster General, 1908, p. 13.)

THE POWER OF THE POSTMASTER GENERAL TO FIX MINIMUM RATES.

It will be observed that the statute authorizing the Postmaster General to make allowances for railway post-office car service provides that such allowances may be made at "not exceeding" the rates named therein. It is a well-established principle of law, and confirmed by uniform practice of the executive departments that such authority fixes the maximum rate which may be allowed by the executive officer, and confers the discretion upon him to fix a lower or minimum rate for the service. This question has been directly passed upon by the courts in defining the power of the Postmaster General under the law authorizing and directing him to make readjustments of compensation for the transportation of mails by railroads. The language of the statute (R. S., sec. 4002) is the same in this respect as that statute (R. S., sec. 4004) with reference to the authorization of railway post-office car allowances. It provides that the pay per mile per annum shall

"not exceed" the rates named. The Court of Claims, in the case of *Eastern Railway Company* v. *The United States* (20 C. Cls., 23, affirmed in 129 U. S., 391), held that the statute does not establish an absolute rate of compensation, but fixes maximum rates which are not to be exceeded, leaving the Postmaster General the discretion to make contracts at less rates if he should be able to do so. To the same effect are the cases of *Minneapolis & St. Louis Railroad Company* v. *The United States* (24 C. Cls., 350), and *Texas & Pacific Railway Company* v. *The United States* (28 C. Cls., 379).

It is very clear, therefore, that the Postmaster General had the power to fix the rate stated in the orders complained of and that the views on this point are sound, as expressed by the court below in the following language:

> In view of the above statutory provisions conferring large powers on the Postmaster General, it is apparent the maximum rate of compensation therein fixed for the service performed is merely one that can not be exceeded in any contract made by the Post Office Department of the Government with a railway company, and not that such maximum rate may, in the absence of contract to that effect, be demanded by a railway company for the performance of the service. And to this effect are the adjudicated cases.

III.

The orders complained of were an offer which the company could have accepted or rejected. The failure to reject such offer and to refuse to perform the service, and the actual performance of service thereafter, although under objection but with notice that the department would not pay for any greater space than that authorized, was in effect an acceptance.

THE ORDERS WERE OFFERS OF BUSINESS, WHICH WERE, IN EFFECT, ACCEPTED BY FURNISHING THE CARS AND PERFORMING THE SERVICE.

The order of July 18, 1907, and the readjustment order of November 7, 1907, the first authorizing the space in railway post-office cars upon which pay for the same would be based, and the second stating the pay therefor accordingly, were offers by the Postmaster General to the plaintiff company which it was at liberty to accept or reject. They may have been accepted by one of two methods: First, by expressly agreeing to the terms of the orders; and, second, by continuing the performance of service after their issuance and with the knowledge conveyed to plaintiff that the Postmaster General would not vary them. It could refuse by only one means, that of declining to perform the service. A mere objection to the orders, with a continuance of the service, was entirely ineffectual.

There was no express agreement on the part of the company to the terms of the Postmaster General. There was, however, an acceptance of them in effect

by its continued service, although with objection, but in the face of the express and repeated declaration by the department that the terms of the orders would not be modified, that the department would not make any contract with the plaintiff whereby it would be expected from the operation of any postal law or regulation, and that a continuance of such service would be paid for only at the rates named in the orders of the Postmaster General. (Rec., pp. 29, 30, 31, and 32.)

The terms of the department's orders authorizing service could not be changed by the objections of the plaintiff without the acquiescence of the department. The department omitted no opportunity to inform the plaintiff that notwithstanding the objections the terms of the orders authorizing space and pay would not be modified and that if the company performed service it need not expect to receive any greater compensation therefor than that fixed by the orders of the Postmaster General. The court has found as a fact that beginning with the new quadrennial term the service theretofore performed by the plaintiff continued thereafter under the provisions of the Postal Laws and Regulations subject to the fixing of the rate of pay by the Postmaster General in accordance with the law. (Rec., p. 28.) The first act of the Postmaster General thereafter was done on July 18, 1907, by the issuance of an order reducing the authorization of car space in eastbound trains. This was a specific statement of facilities needed in cars

for which the Postmaster General proposed to pay and was to become effective from and after July 23, 1907. (Rec., pp. 29 and 30.) This order was an offer made by the Postmaster General of terms upon which the carrying of the mails in cars should thereafter be paid for. The plaintiff could either accept or reject it. It objected to the change in authorization but continued the service. The department thereafter, on July 25, 1907, replied that the order was made in accordance with reports showing that no greater space than that authorized was needed for postal requirements in the car in question. By letter of July 29, 1907, the plaintiff further questioned the reason for the reduction and this was replied to on August 3, 1907, by the department, stating that the order in question was made strictly in accordance with the practice with reference to the authorization of railway post-office car space. On August 3, 1907, the plaintiff protested against the effect of the order; but the department, by letter of August 19, 1907, replied reaffirming its position and stating that there was nothing to add "except to make it clear that the department can not under any circumstances pay for more space than authorized by the regular orders." During all the time, however, the plaintiff continued to operate the cars and carry the mails and clerks therein. (Rec., p. 30.)

This is the status upon which the claim, if any, must rest, and the question is clearly one whether after the Postmaster General has named the terms upon which a company shall carry the mails, the

plaintiff may, by objecting but by continuing to perform the service, force upon the United States a contract which it declares it will under no circumstances make, and, further, whether such a continuance of service under those circumstances is not a virtual acquiescence in the terms offered by the Postmaster General inasmuch as the plaintiff had the right to refuse to perform service if it so elected.

The situation was not changed by the filing of the distance circular by the plaintiff on July 24, 1907, in which it protested "against furnishing space and facilities for distribution of mails on trains without specific space pay therefor." To understand this protest it must be remembered that the Revised Statutes, section 4004, provides two conditions upon which the transportation pay, based upon the weights of mails carried, may be earned by a carrying company, one of which is that the "mails shall be conveyed with due frequency and speed and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for * * * (railway postal clerks) to accompany and distribute the mails." This requirement is to furnish what are known as apartment cars, for which the railroad company receives no additional specific compensation or pay therefor, being covered by the general transportation pay based on the weights of mails carried. It is only after the space used reaches a requirement of 40 linear feet or more that the specific pay for cars provided for by Revised Statutes, section 4004, and

amending acts, may be allowed. It is clear, therefore, that if this protest meant anything it was leveled against the furnishing of apartment-car space without specific pay therefor. This is confirmed by the fact that at the time the letter in which it occurs was written (July 1, 1907) the order of July 18, reducing car space on the line, had not been made.

Thereafter the Second Assistant Postmaster General, on October 3, 1907, replied specifically to the exceptions and protest accompanying the distance circular and informed the company that the department would not enter into any contract by which it, the company, might be excepted from the operation or effect of any postal law or regulation and that it must be understood that in the performance of service from the beginning of the contract term and during its continuance the company would be subject, as in the past, to all the postal laws and regulations. (Rec., p. 29.) This was another affirmation of the position of the department making the matter entirely clear to the plaintiff that the department would not make a contract upon any terms excepting those which it had named. The plaintiff continued thereafter to carry the mails.

Finally, the department made the readjustment of pay and notified the plaintiff, which again protested against the half lines of railway post-office cars and the rates of pay therefor as stated therein, to which the Second Assistant Postmaster General replied, December 14, 1907, calling attention to previous letter upon the subject and advising the

plaintiff that the department can not pay more for the performance of service than the rates of compensation named in the orders adjusting the pay and in accordance with the orders authorizing railway post-office car space. A further statement by the plaintiff that it reserved the right to claim pay for additional facilities required was met by the Second Assistant Postmaster General, by letter of January 16, 1908, stating that the rate of compensation for cars is fixed upon the authorization of space, such authorization being in accordance with the practice of the department and the needs of the postal service, and further that the department would not pay any additional compensation for any other weights of mails or facilities claimed to be furnished by the company except as duly ascertained and authorized by the department, and that the continuance of service on the route must be with that understanding. The plaintiff's receipt of the pay warrants under protest was likewise replied to that notwithstanding such protest any service performed by the company must be with the distinct understanding that the amount named in the readjusting order is all that can be paid for the service. During all this time the plaintiff continued to perform this service of transporting the mails and furnishing the railway post-office car space. (Rec., pp. 31 and 32.)

It thus appears that the company was at no time left in doubt as to the terms upon which the department offered the business. It may be said that for a

short period after the 1st of July, 1907, the transportation of the mails was conducted under an implied contract according to the provisions of the Postal Laws and Regulations and certain terms to be thereafter named by the Postmaster General. He did name those terms thereafter, which were offers of business to the plaintiff. They were met for a time by objections from the plaintiff which might be considered as counter propositions. These propositions were in each case specifically declined by the Postmaster General, who at all times restated his original offers and insisted that he would make no other contract. The company had the right to accept or reject the Postmaster General's offers. It did not reject them, but during all the time the plaintiff continued to perform the service in transporting the mails and furnishing railway post-office car space and received the compensation for such space as authorized by the orders of the Postmaster General.

It is submitted that this action of the plaintiff constituted an acceptance of the terms offered by the Postmaster General, although the plaintiff made objection to the terms.

This view has been suggested strongly by the courts in postal cases, but the cases heretofore decided have not been exactly in point. It will be well to examine the views of the courts in these cases:

In the case of the *Chicago & Northwestern Railway Company* v. *United States* (15 C. Cls., 232) the judgment of the lower court was reversed in the Supreme Court (104 U. S., 680), but such reversal was upon the

ground that there was a specific time contract which could not be modified without the consent of both parties. The statement of the lower court upon the effect of a protest is instructive in this case:

> No protest could save a right which they did not possess, nor change the terms proffered them for performing if they elected to perform. Having made their election they are bound by it. (P. 245.)

This dictum was made on the theory that the court was dealing with a contract which was subject to an act of Congress and the order of the Postmaster General, and the further theory that the company could elect to continue or discontinue the service. In that respect it was assumed that the case was similar to the one at bar where there was no specific contract for a fixed time between the plaintiff and the Government. If the theory of the lower court had been correct with reference to the nature of the contract it would seem that its dictum with respect to the futility of a protest was correct, and the fact that the Supreme Court reversed the decision of the lower court on the ground that it was mistaken with reference to the character of the contract (that is, there existed a contract which was not subject to the change noted) does not discredit these views expressed by the lower court in the particular urged here.

In the case of the *Eastern Railroad Company* v. *United States* (20 C. Cls., 23) the question involved was whether the Postmaster General could by order

restating the compensation he allowed a railroad company for mail transportation in compliance with the act of Congress reducing compensation, thus lawfully reduce the pay to which the company was entitled where there did not exist any time express contract. The case was one where the service continued into a new quadrennial term following a term in which there was an express and time contract. During the new term the relations existing between the company and the Government were only those prescribed by the statutes and regulations as in the case at bar. Thereafter the Postmaster General made the order reducing the pay 5 per cent provided by law. The court say:

> So in this case it is to be presumed that when the company commenced the transportation of the mails, July 1, 1877, it had been agreed that payment should be made for what was done and nothing more. So long as the Postmaster General furnished the mails and the claimant continued to carry them an implied contract existed, which might be terminated at any time by either party. The implied compensation was the reasonable worth of the service, and that might be measured by the previous dealings of the parties for like service and the statutes regulating the same. The maximum rate fixed by statute would no doubt be considered the reasonable and implied compensation until the Postmaster General should make other terms, with the concurrence, express or implied, of the claimant.

> On the 12th of July, 1878, the Postmaster General ordered a reduction to be made for service after the first of that month of 5 per cent from the rates previously paid, in accordance with an act of Congress passed June 17, 1878 (Supp. to R. S., 359). Immediate notice of this order was given to the claimant and no objection was made to it. This order and notice constituted an offer on the part of the Postmaster General, which the claimant might decline or accept at its pleasure. Having thereafter continued the service for three years and received a reduced compensation without objection, the company must be held to have accepted the offer of the Postmaster General modifying the previously existing implied contract relations between them.

The judgment of the lower court was affirmed by the Supreme Court of the United States in 129 United States, 391, in whose opinion it is stated that the company was under no legal obligation to carry the mails after July 1, 1877, and that after the reduction of 5 per cent was made it was at liberty to discontinue the transportation on its cars.

It is true that in the case cited the company did not protest, but it is clearly stated that the order of the Postmaster General was an offer which the claimant might decline or accept at its pleasure, and it is held that the company accepted it by performing the service without objection. In the case at bar the company objected, but chose to perform the service, although it had the privilege of declining to do so.

This appears to have been in effect an implied concurrence.

In the case of the *Minneapolis & St. Louis Railway Company* v. *United States* (24 C. Cls., 350) the company sued for additional pay for delivering the mails at offices within 80 rods of way stations and to recover deductions made for delayed trains. There was no objection made by the company to the regulations of the department under which the Postmaster General's orders had been made until the suit was brought. The case is cited here to show the view of the court with respect to the nature of the contract.

> The voluntary compliance with the requests contained in the weight and distance circulars sent out by the Postmaster General was an application for the service of carrying the mails by the claimant corporation, and the orders of the Postmaster General were offers of the business at the prices therein stated. Those orders and the business were subject to the provisions of the statutes and the general regulations of the Post Office Department, which the parties were bound to know, as well as the usual and ordinary customs and practices of the department in relation to railroad mail service, with which all persons engaged in that service are presumed to be familiar. All these taken together constitute the terms of the offers, and the claimant, by taking and carrying the mails, accepted those terms. (Pp. 360 and 361.)

In the case of the *Texas & Pacific Railway Company* v. *United States* (28 C. Cls., 379), the company

sued for full pay for a service which had been adjusted by the Post Office Department as "lap service" at a lower rate than the maximum allowed by the statute. There had been a protest which was subsequently withdrawn. The right of the company to continue or discontinue the service and the right of the Postmaster General to fix the terms upon which he would have the service performed or to arrange for the service otherwise if such terms were not agreed to are set forth in the opinion of the court as follows:

> The company was under no obligation to perform this service for any agreed period and could have refused to take the mails at any time. Complaining of the injustice of the contract did not annul it nor make another and different one in its place. If the company had refused to perform the service the Postmaster General might have acceded to the claimant's terms, or he might have discontinued the service and have turned the mails over to the Galveston, Harrisburg & San Antonio Railway Co., but he had a right to the option, just as the claimant had the option to carry the mails on the terms agreed upon or to refuse to carry them at all.
>
> The contract could not be changed by complaints and protests.
>
> It would be a novel principle to introduce into the law of contracts that a contractor for continuous service at agreed prices can raise the price by complaining of the injustice of the contract while still performing the

service and regularly taking pay according to contract price.

But the letter of the company was not a protest such as is admitted to avoid the otherwise legal effect of an act done. It was a mere complaint, terminating with a request for a modification of the order of adjustment.

MERE COMPLAINT UNAVAILING.

The plaintiff's complaints against the orders of the Postmaster General that named the terms upon which the business was offered did not effect a modification of those terms. The most that could be claimed for them is that they constituted counter propositions on the part of the plaintiff. These propositions, however, were specifically declined by the department upon every occasion and the terms offered by the Postmaster General were reaffirmed. It has been said by this court that the department can not force a contract upon a railroad company situated as this company was (*Chicago, Milwaukee & St. Paul Railway Company* v. *United States*, 198 U. S., 389). With more reason it must be said that a railroad company can not force a contract upon the United States. This principle being clearly recognized, the rights of the parties in an issue presented as in this case must be determined by their general rights with respect to the transportation of the mails. The Postmaster General has the undoubted right to order and direct the transportation of the mails on railroad routes. Under the statutes he has the right and power to fix the rates of compensation which may be

paid for the service rendered. These rates may be minimum rates and need not be the maximum rates named in the statutes. He has the right to arrange with one transporting company or with another for the carriage of mails, and if the terms upon which he offers the business are not satisfactory to any one railroad company he has the right of a declination by the company to perform the service and the privilege of making other arrangements if he sees fit to do so. Upon the part of the railroad company, if it has not been Government aided by grant of lands or otherwise, it has the right of declining to accept the terms offered by the Postmaster General, but it has no right or power to fix terms upon which it will carry the mails as against the orders, directions, and judgment of the Postmaster General. It necessarily follows from these considerations that unless the Postmaster General agrees to the modified terms suggested by a railroad company a complaint or protest on its part will give it no right of action to recover from the United States upon the basis of its own proposed terms, and that if it is dissatisfied with the terms offered by the Postmaster General its only recourse is to decline to perform the service.

IV.

Conclusion.

From the foregoing it appears that the orders of the Postmaster General were not issued in violation of the terms and conditions of any contract between the plaintiff and the defendants; that he had authority to

make the orders in question; that such orders were offers by the Postmaster General which the plaintiff could accept or reject; that the plaintiff objected to and complained against the orders, but continued to perform the service, and that the Postmaster General never acceded to any objection of the plaintiff, but on the other hand declined to modify his orders and notified plaintiff that a contract would not be made on any other basis. Furthermore the Postmaster General had the right to fix the terms upon which he would have the mails carried; and the recourse the plaintiff had if not satisfied therewith was to discontinue the service, notwithstanding which the plaintiff continued the service at all times. It is therefore respectfully submitted that the judgment of the Circuit Court should be affirmed.

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Of Counsel.

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ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 716. Argued April 30, 1912.—Decided June 7, 1912.

Public policy requires that the mail be carried subject to postal regulations, and that the Department and not the railroad shall, in the absence of contract, determine what service is needed and the conditions under which it shall be performed.

A railroad company, not required so to do by its charter, is not bound to furnish postal cars of the kind demanded or to accept terms named by the Postmaster General, but if it does carry the mail, it does so as an agency of the Government and subject to the laws and the regulations of the Department.

A railroad company cannot, by using a larger railway postal car than that authorized by the Department, recover the greater value of the car.

The Postmaster General can establish full railway postal lines, and as the greater includes the less, he can also establish half lines; he can abolish between two points a full line in one direction and a half line in the other.

THE facts, which involve claims made by a railroad company for furnishing railway post-office cars to the Government, are stated in the opinion.

Mr. Robert Dunlap, with whom *Mr. Wm. R. Smith*, *Mr. Lee F. English*, *Mr. James L. Coleman* and *Mr. Gardiner Lathrop* were on the brief, for plaintiff in error:

The parties were agreed upon the value of 60-foot postal car lines as the maximum rate prescribed by Congress, and as such car lines were in fact used by the Government it must be held as having agreed to pay that value. *Minneapolis &c. Ry. Co.* v. *Columbus Mill Co.*, 119 U. S. 149, is in no sense analogous.

The Government in fact accepted and used 60-foot cars during the entire period in question. There was no controversy between the parties as to the amount of pay which was proper for the use of a 60-foot car.

The railway company very plainly offered to the Government the use of 60-foot railway post-office cars. The use was for both directions, going and returning, upon the same route. The Government sought to force the railway company to furnish to it a 60-foot postal car in one direction and a 50-foot postal car on the return. The railway company, declining to divide the car line defined in the act of Congress, upon which it was entitled to base its pay, the attempt to reduce the compensation, not upon the ground that $40.00 per mile per annum was not the proper charge for a 60-foot car, but solely upon the ground that the Government only wished to use on the return trip of such car fifty feet of space therein, will not avail.

The Government having in fact accepted and used the car is bound to pay for such use what throughout this case it admits such car is worth. *Thompson* v. *Sanborn*, 52 Michigan, 141; *Griffin* v. *Knisely*, 75 Illinois, 412, 417, 418; *Conway* v. *Starkweather*, 1 Denio, 113.

The half lines R. P. O. cars order made by the Postmaster General, effective July 23, 1907, was made without authority, is evidently contrary to the act of Congress, is oppressive and unreasonable, and therefore, invalid.

Congress provided a system for computing the pay and

indicated the manner in which the railway company was to receive pay for the rent of its cars. The order of the Assistant Postmaster General in attempting to change such basis was not only in excess of the postal regulations, but sought to impose conditions not embraced in the law nor covered by any contract with the railway company, either express or implied. The order of the Postmaster General is a plain attempt to amend or add to the act of Congress. That is not permissible. *Morrill* v. *Jones*, 106 U. S. 466, 467; *Bruhl Bros.* v. *Wilson*, 123 Fed. Rep. 957, 958; *Hoover* v. *Salling*, 110 Fed. Rep. 43.

The Postmaster General had no authority to impose new and unjust or unduly burdensome conditions. *United States* v. *Stage Co.*, 199 U. S. 422; *United States* v. *Bostwick*, 94 U. S. 66.

The order is an attempt to change the express provisions of the law and thus change the basis of compensation without the consent of the railway company, the other party interested therein. It would be invalid. *United States* v. *Symonds*, 120 U. S. 46, 48, 49; *United States* v. *Barnette*, 165 U. S. 174, 178, 179; 2 Willoughby on the Constitution, 1326.

If there was no express agreement fixing the price for each car line, yet inasmuch as the Government in fact accepted and used 60-foot cars for the round trips, it was bound to pay the reasonable value thereof and the record shows the Government to have admitted such value of such car line to be the maximum fixed by Congress and the railway company was entitled to demand and receive that maximum unless and until it agreed to lease its cars for a less sum, which was not either claimed or shown.

A statutory maximum is the measure of the reasonable value of a carrier's service, the full extent of which it may lawfully demand. *Manchester &c. Ry. Co.* v. *Brown*, L. R. 8 App. Cas. 715; *Great Western Ry. Co.* v. *McCarthy*,

L. R. 12 App. Cas. 218, 235; *Wolcott* v. *Yeager*, 11 Indiana, 84.

There is the presumption, in the absence of a showing to the contrary, that the maximum rate fixed by the legislature is the measure of a reasonable charge, where less has not been specially agreed upon. *Beals* v. *Amador County*, 35 California, 624; *Archibald* v. *Thomas*, 3 Cowen, 284, 289.

The Government must pay for the kind of car which is in fact furnished and used. *Horton* v. *Cooley*, 135 Massachusetts, 589.

There was no evidence nor any fact admitted which tended to show that the maximum charge fixed by Congress was not the measure of the reasonable value of the use of such cars in the absence of an express agreement to the contrary. *Vail* v. *Jersey Little Falls Mfg. Co.*, 32 Barb. 564; *Sidener* v. *Fetter*, 19 Indiana, 310; *Smithmeyer* v. *United States*, 147 U. S. 343, 359, 360; *The Albert Dumois*, 177 U. S. 255.

Eastern Railroad Company v. *United States*, 20 Ct. Cl. 23, 43, distinguished. See *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cl. 379.

On *quantum meruit*, where the contract has been varied or departed from by the parties during performance, such contract is admissible as containing admission of the standard of value, etc. *Reynolds* v. *Jourdan*, 6 California, 109; *Castagnino* v. *Balletta*, 82 California, 250; *Shirk* v. *Brookfield*, 79 N. Y. Supp. 225; *Boyd* v. *Vale*, 82 N. Y. Supp. 932; *Schulze* v. *Farrell*, 126 N. Y. Supp. 678.

Mr. Joseph Stewart, with whom *Mr. Assistant Attorney General John Q. Thompson*, *Mr. S. S. Ashbaugh* and *Mr. P. M. Cox* were on the brief, for the United States:

The issues presented here are wholly issues of law arising upon the facts as found by the court below and admitted, if at all, in the pleadings, and no question can be

raised here, nor was such raised by assignment of error, as to the existence of this alleged fact which the court did not include in its findings and which is not admitted in the pleadings.

All argument submitted by plaintiff in error to show that the maximum rate fixed by the statute for pay for a full line of railway post-office cars is the value of the service rendered by plaintiff in error is irrelevant. The cases cited in support of plaintiff's contention may therefore be dismissed from consideration in this court.

The second main proposition of the plaintiff in error is that the half-line railway post-office cars order complained of was made without authority, was evidently contrary to the law, and was oppressive and unreasonable. *Morrill* v. *Jones*, 106 U. S. 466; *Bruhl* v. *Wilson*, 123 Fed. Rep. 957, and *Hoover* v. *Salling*, 110 Fed. Rep. 43, are all cases where some department of the Government attempted by an order or direction to limit or curtail some right guaranteed by a law of Congress to the whole people, and are not in point.

The case at bar is clearly distinguished from this class of cases. Congress had provided that additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars at a rate not exceeding certain rates named in such statute for cars of certain lengths. This statute does not guarantee to railroad companies an absolute allowance for such cars nor an allowance of the maximum rates fixed by law in case such cars are authorized. As will be shown hereinafter, the law is merely permissive and fixes maximum rates, allowing the Postmaster General full power and discretion to fix minimum rates for such space as he may authorize, in accordance with the actual needs of the service.

In the conduct of the postal service the Post-Office Department is performing a governmental function. It has complete control of the conduct of the postal service

in the exercise of one of the sovereign powers of the people. A railroad company carrying the mails is not a common carrier with reference to such mails, but sustains a specific relation toward the United States. *Bankers' Mut. Cas. Co.* v. *Minneapolis &c., Ry. Co.* 117 Fed. Rep. 434; *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cl. 379; *Minneapolis &c. Co.* v. *United States*, 24 Ct. Cl. 350.

If the company did not choose to accept the terms of the Postmaster General it had the privilege to decline to perform the service, but it could not, by continuing to perform the service, force its own terms upon the United States. Rev. Stat., §§ 3997, 3999, were practically superseded by the act of March 3, 1873 (Rev. Stat., § 4002), and the amending statutes authorizing the readjustment of railroad mail pay on the basis of the average daily weights and upon an entirely new scale of prices.

The making of the order by the Postmaster General was not a violation of the contractual relations. *Minneapolis &c. Ry. Co.* v. *United States*, 24 Ct. Cl. 350.

The Distance Circular and proceedings thereon, including the railway company's reply, show that it was understood, and that it would be subject as in the past to all the postal laws and regulations which were then or might become applicable during the term of the service.

It will be entirely clear from the above that no contract rights of the plaintiff were violated by the order made by the Postmaster General.

The road in question was not a land grant aided railway, and was under no obligation to the Government to carry the mails or furnish the space in cars for railway post-office service, but was free to carry the mails or to decline to carry them or to contract with the Government for the performance of such services or to decline to contract. *Eastern Railroad Co.* v. *United States*, 129 U. S. 391; *Minneapolis, &c. Ry. Co.* v. *United States*, 24 Ct. Cl. 350.

The Postmaster General had power to make the order

complained of authorizing "half car lines" and to subsequently fix the pay for the railway post-office car service at a rate below the maximum provided by law for full lines of railway post-office cars. See statutes and regulations governing allowance of railway post-office car pay. Section 4004, Rev. Stat., as amended by act of March 2, 1907, 24 Stat. 1212; act of March 3, 1879, § 4, 20 Stat. 358; § 1179, par. 3, Postal Laws and Regulations.

The Postmaster General has power to fix minimum rates. Rev. Stat., §§ 4002, 4004; *Eastern Ry. Co.* v. *United States*, 20 Ct. Cl. 23, affirmed, 129 U. S. 391; *Minneapolis & St. Louis Railroad Co.* v. *United States*, 24 Ct. Cl. 350; *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cl. 379.

The orders complained of were an offer which the company could have accepted or rejected. The failure to reject such offer and to refuse to perform the service, and the actual performance of service thereafter, although under objection but with notice that the Department would not pay for any greater space than that authorized, was in effect an acceptance.

The orders were offers of business, which were in effect accepted by furnishing the cars and performing the service. *Chicago & Northwestern Ry. Co.* v. *United States*, 15 Ct. Cl. 232; *Eastern Railroad Co.* v. *United States*, 20 Ct. Cl. 23; *S. C.*, 129 U. S. 391; *Minneapolis & St. Louis Ry. Co.* v. *United States*, 24 Ct. Cl. 350; *Texas & Pacific Ry. Co.* v. *United States*, 28 Ct. Cl. 379.

The Department cannot force a contract upon a railroad company situated as this company was. *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 198 U. S. 389. With more reason it must be said that a railroad company cannot force a contract upon the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Atchison, Topeka & Santa Fé Railroad had a four-year contract with the Post-Office Department to carry

the mail between Chicago and Kansas City. Payment was made on the basis of weight hauled and the speed with which the service was performed. The company also furnished sufficient "railway post office cars," sixty feet in length, to make three round trips each twenty-four hours. This constituted three "car lines," for which the plaintiff received the maximum additional compensation then allowed by Rev. Stat., § 4004, under which the pay varied in proportion to the length of the car.

This contract was to expire June 30, 1907, by limitation; and, with a view of obtaining data, and proposing terms for a new arrangement to begin July 1st, 1907, the postal authorities, in February, mailed to the company a "Distance Circular," which, among other things, stated that the company was "to accept and perform mail service under the conditions prescribed by law and the regulations of the Department." The form was filled out and signed by an agent of the company. He, however, noted exceptions to certain postal orders previously promulgated, and "future regulations which, in the company's opinion, might be unjust or unfairly reduce its compensation for services." The circular, with these objections, was not received by the Department until July 24th, but the company, in the meantime, and without any express contract, continued to carry the mails and to furnish the three car lines. Payment therefor was made at the maximum rate allowed by the act of March 2, 1907 (34 Stat. 1205, 1212, c. 2513), which declared:

"Additional pay allowed for every line comprising a daily trip each way of railway post-office cars shall be at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length . . . thirty-two dollars and fifty cents per mile per annum for fifty foot cars and forty dollars per mile per annum for cars fifty-five feet or more in length."

The Reports and Returns, as to the amount of mail car-

ried over plaintiff's road during the spring of 1907, indicated that the quantity of east bound matter was less than that going west from Chicago to Kansas City. Accordingly the Department, on July 18, 1907, "authorized 'three half lines' R. P. O. cars fifty feet in length . . . to supersede three 'half lines' of such cars sixty feet in length over route 135,098, Chicago to Kansas City." As the distance between the two cities was about 450 miles this change would largely reduce the rate of pay, and the company at once objected, claiming in the lengthy correspondence, and subsequent suit which followed, that the statute did not authorize "half car lines"; that the order would require the company to furnish 60-foot cars in one direction and 50-foot cars on the return, thus involving an empty haul one way or forcing the company to furnish 60-foot cars both ways, without corresponding or adequate compensation.

The Department, on the other hand, insisted that under the statute, regulations and long continued practice it had the right to establish "half lines"; that "no contract would be made with any railroad by which it could be excepted from the postal laws and regulations," and that compensation would only be made in accordance with the orders of the Department establishing the three half lines.

The warrant in settlement of the September Quarter was made out on this basis. It was accepted by the company, but under protest. In answer the Department again repeated the statement that any service performed by the company must be with the distinct understanding that payment was to be made in accordance with the orders for space, facilities and car service, required by the postal authorities. The plaintiff continued to protest and to furnish the three full lines. They were daily used by the Department for postal purposes, but payment was made only for half lines.

The plaintiff thereupon brought suit, under the Tucker

Act, claiming that even though there was no express agreement, it was entitled, as under an implied contract, to recover the reasonable value of the three car lines authorized by law, furnished by the company and actually used by the Post-Office Department. This contention should have been sustained but for the fact that neither party was bound to continue the indefinite relation begun July 1, 1907, and under which the rights and liabilities of each arose, from day to day, as the facilities were furnished by the one and used by the other. Whatever may be the rule between private parties where both are demanding performance, and each is insisting on different terms (*Thompson* v. *Sanborn*, 52 Michigan, 141; *Jenkins* v. *National Association*, 111 Georgia, 732, 734), no such question arises in a controversy like this between the railroad on the one hand and the post-office on the other. For, public policy requires that the mail should be carried subject to postal regulations, and that the Department and not the railroad should, in the absence of a contract, determine what service was needed and under what conditions it should be performed. The company in carrying the mails was not hauling freight, nor was it acting as a common carrier, with corresponding rights and liabilities but in this respect it was serving as an agency of government, and as much subject to the laws and regulations as every other branch of the Post-Office.

The statute defined a car line, but did not fix the compensation. It left that to be determined by the Postmaster General, who could have named any rate, not to exceed the statutory maximum. By virtue of that authority he could have made the same price for 60-foot cars as for 50-foot cars, and, as the greater includes the less, he could abolish full lines, or establish "half lines," and adjust the rates accordingly. Such had been the practice before the passage of the act of 1907, and there is nothing in its language indicating any intent

to change the construction previously given, Rev. Stat., § 4004.

The railroad, however, was not bound to furnish "half lines" nor to accept the terms named by the Postmaster General. For Congress had not legislated so as to require compulsory service, at adequate compensation to be judicially determined or in a method provided by statute. And as the plaintiff's road between Chicago and Kansas City had not been aided by a land grant, it was, under existing law, not obliged to carry the mails when tendered, nor to supply R. P. O. cars when demanded. *Eastern Railroad* v. *United States*, 129 U. S. 391, 395–396; *United States* v. *Alabama G. S. Railroad*, 142 U. S. 615. It may have been impracticable to furnish long cars one way and short ones the other. But there was in that fact no hardship imposed by law. The company could have protected itself against onerous terms, or inadequate compensation, by refusing to supply the facilities on the conditions named by the Department. But if, instead of availing itself of that right, it preferred to furnish 60-foot cars after having been informed that the Department only needed and would only pay for those 50 feet in length, the company cannot recover for more than the Department ordered; nor under the statute can it demand compensation for full lines, when the Postmaster General had established "half lines" consisting of cars of one length going and of another returning on the route between Chicago and Kansas City.

There was no error in dismissing the complaint, and the judgment is

Affirmed.